

o. 83-859-CSY
Status: GRANTED

Title: California, Petitioner
V.
Charles R. Carney

Docketed:
November 25, 1983

Court: Supreme Court of California

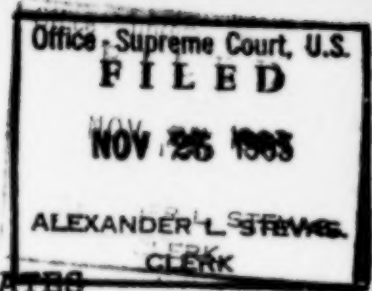
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ntry	Date	Note	Proceedings and Orders
1	Nov 25 1983	G	Petition for writ of certiorari filed.
2	Nov 25 1983		Application for stay filed.
3	Nov 28 1983		Response requested by Rehnquist, J. Due Dec. 5, 1983.
4	Dec 5 1983		Response received.
5	Dec 7 1983		Application for stay granted by Rehnquist, J.
7	Dec 27 1983		Order extending time to file response to petition until January 23, 1984.
8	Jan 4 1984		DISTRIBUTED. January 20, 1984
9	Jan 26 1984		Brief of respondent Charles R. Carney in opposition filed.
10	Feb 1 1984		REDISTRIBUTED. February 17, 1984
12	Mar 9 1984		REDISTRIBUTED. March 16, 1984
13	Mar 19 1984		Petition GRANTED. *****
15	Apr 17 1984		Order extending time to file brief of petitioner on the merits until June 2, 1984.
16	Jun 4 1984		Joint appendix filed.
17	Jun 4 1984		Brief of petitioner California filed.
18	Jun 2 1984		Brief amicus curiae of Minnesota, Florida and Hawaii filed.
19	Jun 8 1984		Brief amicus curiae of United States filed.
20	Jul 2 1984		Brief amicus curiae of California filed.
22	Jul 6 1984		Order extending time to file brief of respondent on the merits until August 2, 1984.
23	Aug 2 1984		Record filed.
24	Aug 2 1984		Brief of respondent Charles R. Carney filed.
25	Aug 21 1984		CIRCULATED.
26	Aug 28 1984		SET FOR ARGUMENT. Tuesday, October 30, 1984. (2nd case)
27	Oct 23 1984	X	Reply brief of petitioner California filed.
28	Oct 30 1984		ARGUED.

88-859

NO. _____



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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i.

QUESTIONS PRESENTED

1. Whether the Fourth and Fourteenth Amendments to the United States Constitution permit law enforcement officers to conduct a search of a fully mobile "motor home" without a search warrant, pursuant to the vehicle exception to the warrant requirement created by this Court in Carroll v. United States (1925) 267 U.S. 132, 149, when the officers have probable cause to believe the motor home contains that which is lawfully subject to seizure.

2. Whether the underlying basis for the vehicle exception is inherent mobility, as this Court announced in Carroll, or whether the California Supreme Court correctly interpreted the United States Constitution when it repudiated the Carroll reasoning and announced the underlying

ii.

basis for the vehicle exception was reduced expectation of privacy.

3. If a motor home is entitled to different treatment from other vehicles, how does one distinguish between a motor home and any other vehicle for purposes of the vehicle exception.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California,
respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California reversing the order of probation, entered on September 8, 1983. A petition for rehearing was denied October 6, 1983. The remittitur was issued on October 11, 1983.

OPINIONS BELOW

The opinion of the California Supreme Court reversing the order of probation (People v. Carney (1983) 34 Cal.3d 597) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing without opinion appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on September 8, 1983. A timely petition for rehearing was denied on October 6, 1983. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

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CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution,
Amendments Five and Fourteen.

STATEMENT OF THE CASE

In an information filed by the
District Attorney of San Diego County of
September 14, 1979, respondent, Charles
Richard Carney, was charged with a
single count of possession of marijuana
for sale. (CT 1.)^{1/}

Respondent's motion to suppress
evidence taken from the search of his
motor home was submitted on the tran-
script of the preliminary hearing and

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1. The designation "CT" refers to
the Clerk's Transcript on appeal. The
designation "RT" refers to the
Reporter's Transcript on appeal.

subsequently denied on October 19, 1979.
(CT 41.)

On November 5, 1979, respondent withdrew his not guilty plea and entered a plea of nolo contendere to the charge. On January 8, 1980, respondent was granted probation for a period of three years. (CT 34-36, 44.)

Respondent's conviction was affirmed by the California Court of Appeal on March 18, 1981. On September 8, 1983, the California Supreme Court reversed respondent's grant of probation.

STATEMENT OF FACTS^{2/}

While engaged in an ongoing investigation into narcotics activities

2. The facts are taken from the Reporter's Transcript of the preliminary examination held on September 5, 1979. This testimony served as the sole evidentiary basis for the trial court's decision to deny respondent's motion to suppress evidence.

in downtown San Diego on May 31, 1979, Drug Enforcement Administration (DEA) Agent Robert Williams observed respondent, Charles Carney, approach a young Mexican boy. Williams continued to observe the transaction because respondent did not seem to belong in the area. Agent Williams watched as respondent and the boy got into a Dodge Mini Motor Home which was parked in a public parking lot at 4th and G Streets. (RT 4-8, 10.)

Agent Williams noted the license number of the motor home and recalled he had, on numerous occasions, received information that this particular vehicle was involved in drug activity. The information was received by letter and telephone contacts from an organization known as "WETIP" (We Turn In Pushers). Agent Williams knew the motor home belonged to Lee Bowman. Williams

also knew an unidentified man had taken Bowman's place in dealing narcotics, and exchanging marijuana for sex with young boys, from the motor home. Williams estimated the age of the boy respondent escorted into the motor home to be 15 or 16. (RT 8-10, 14-15, 51, 55.)

The boy emerged from the motor home approximately an hour and a quarter after entry. Williams, along with Agents Clem and Peralta, followed the boy, made contact with him and informed the boy they were agents conducting a narcotics investigation. In response to Williams' questions, the boy stated the "older man" asked him to have sex with him. He allowed the older man to orally copulate him in exchange for a small bag of marijuana. (RT 15-22.)

Williams took the boy back to the motor home and had the boy knock on

the door. When respondent opened the door and stepped out of the motor home, Williams, Clem and Peralta identified themselves as agents. Agent Clem stepped up one step and looked inside the motor home to see if there were any other occupants in the vehicle. Clem observed, in plain view on a table inside the motor home, a large bag of marijuana, a small bag of marijuana, some Ziploc baggies and a scale. When Clem informed Williams of his observations, Williams placed respondent under arrest. Photographs of the interior of the motor home were taken by Agent Williams. The vehicle was then driven to the National City office of the Narcotics Task Force for an inventory. During the inventory search marijuana was found inside the cupboard above the

table and inside the refrigerator. (RT 23-27, 29, 34-35, 40-49, 72-73.)

HOW THE FEDERAL QUESTION
IS PRESENTED

In the trial court, counsel for respondent filed a motion to suppress the evidence seized from his motor home on the ground the seizure violated both the federal and state constitutions. (CT 2-16.) The trial court denied respondent's motion on several bases, one of which was that the search of the motor home and seizure of evidence therefrom was authorized by the vehicle exception to the Fourth Amendment's warrant requirement. Respondent's argument to the California Court of Appeal, that the "automobile exception" did not apply to a motor home, was rejected by the Court of Appeal. Respondent presented the same argument

to the California Supreme Court. In its opinion, the California Supreme Court held a motor home is fully protected by the United States Constitution's Fourth Amendment guarantee against unreasonable search and seizure and is not subject to the "automobile exception" to the warrant requirement. (34 Cal.3d 597, 610; appen. A, p. 30.) Underlying the California Supreme Court's decision is the premise that inherent mobility has been supplanted by reduced expectation of privacy as the primary reason for the "automobile exception." (34 Cal.3d at pp. 604-605; appen. A, pp. 11-17.) Petitioner's timely petition for rehearing unsuccessfully urged the California Supreme Court's decision was erroneously based on a mistaken premise, and that the court failed to define the scope of its rule.

REASONS FOR GRANTING THE WRIT

The California Supreme Court has erroneously disregarded the holdings of this Court concerning the basis underlying the vehicle exception to the Fourth Amendment's warrant requirement. The California Supreme Court held inherent mobility of a vehicle no longer provides the basis for the vehicle exception. Instead, the California Supreme Court erroneously referred to the exception as an "automobile exception" and concluded it is premised on a reduced expectation of privacy an individual has in his automobile. Based upon this false premise, the California Supreme Court held the search of respondent's motor home could not be based on the "automobile exception" because an individual has a greater expectation of privacy in a motor home than in an automobile.

The premise underlying the California Supreme Court's decision conflicts with close to 60 years of precedent from this Court. According to the opinions of this Court, inherent mobility of a vehicle creates sufficient exigency to render a warrant unnecessary to search a vehicle, provided there is probable cause to search. Thus, this Court should grant the writ to insure the Federal Constitution is properly interpreted in accordance with this Court's decisions.

This case is critically important because there are millions of vehicles travelling the highways of this nation which could be called "motor homes." Most of these vehicles have added room and facilities inside which make them particularly useful as mobile criminal operational centers.

Increasingly law enforcement is finding the larger models being used as illegal drug laboratories. Though many of the vehicles which could be characterized as motor homes are large, they are no less mobile than a subcompact automobile. In fact, because they may be fully self-contained, such vehicles are far more mobile than the traditional automobile.

Though the California Supreme Court creates a constitutionally significant class of vehicles, those vehicles which make up the class remain a mystery because the California Supreme Court never defines the class. Law enforcement officers have been saddled with the impossible burden of discerning the constitutional significance of the hundreds of shapes, makes and present uses of motor vehicles. This burden stands in stark contrast to need for

clear standards or "brightlines" which has been recognized by this Court.

(New York v. Belton (1981) 453 U.S. 454, 458.) Thus, instead of interpreting the United States Constitution in such a fashion as to provide guidance to those sworn to enforce its provisions, the California Supreme Court has created a rule which defies definition. This unacceptable state of affairs can be settled only through intervention from this Court.

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ARGUMENT

I

THE CALIFORNIA SUPREME COURT
ERRONEOUSLY DISREGARDED
PRECEDENT OF THIS COURT IN
HOLDING THAT MOBILITY OF A
VEHICLE HAS BEEN SUPPLANTED
BY REDUCED EXPECTATION OF
PRIVACY AS THE BASIS FOR
THE VEHICLE EXCEPTION TO
THE FOURTH AMENDMENT'S
WARRANT REQUIREMENT

In its majority opinion, the California Supreme Court engages in a discussion of the genesis of what it calls the "automobile exception" to the warrant requirement of the Fourth Amendment. (People v. Carney (1983) 34 Cal.3d 597, 604-605; appen. A, pp. 9-17.) Though it recognized the original reason for the exception was the inherent mobility of vehicles, the California Supreme Court incorrectly concluded mobility is no longer the prime justification for the automobile exception under the

federal constitution, focusing instead on the diminished expectation of privacy which surrounds the automobile. (People v. Carney, supra, 34 Cal.3d pp. 604-605; appen. A, pp. 10-17.) The California Supreme Court's conclusion is contrary to this Court's decisions and accepted policy.

The overwhelming bulk of authority supports the position the primary reason for the vehicle exception under the federal constitution is the inherent mobility of the vehicle. Mobility was the justification used by this Court 59 years ago when it announced the vehicle exception. (Carroll v. United States (1925) 267 U.S. 132, 153.) As recently as 1982, this Court confirmed mobility as the basis for the exception. (United States v. Ross (1982) 456 U.S. 798, 804-809.)

Between 1925 and 1982 this Court repeatedly reconfirmed this premise. (See, Colorado v. Bannister (1980) 449 U.S. 1, 3; Chambers v. Maroney (1970) 399 U.S. 42, 48-49; Dyke v. Taylor Implement Co. (1968) 391 U.S. 216, 221; Brinegar v. United States (1949) 338 U.S. 160, 164.) The United States Circuit Courts of Appeals have applied the Carroll analysis. (See, United States v. Cadena (5th Cir. 1979) 588 F.2d 100, 102; United States v. Lovenquith (9th Cir. 1975) 514 F.2d 96, 99; United States v. Cusanelli (6th Cir. 1973) 472 F.2d 1204, 1206; United States v. Miller (10th Cir. 1972) 460 F.2d 582, 585.) The Supreme Court of Arizona twice addressed the vehicle exception in the context of a motor home case and based its decisions on the inherent mobility

of the vehicle. (State v. Million (Ariz. 1978) 583 P.2d 897, 902; State v. Sardo (Ariz. 1975) 543 P.2d 1138, 1142.) As recently as February of 1983, the California Supreme Court recognized mobility as the primary basis for the vehicle exception. (People v. Chavers (1983) 33 Cal.3d 462, 468-469; see also, People v. Laursen (1972) 8 Cal.3d 192, 201; People v. McKinnon (1972) 7 Cal.3d 899, 907.)

For whatever reason, the California Supreme Court chose to redefine the exception ignoring this Court's precedent. In its discussion of United States v. Ross (People v. Carney, supra, 34 Cal.3d at pp. 605-606, fn. 3; appen. A, pp. 14-16) the California court ignored the Ross court's discussion of mobility as the primary basis for the

vehicle exception. (United States v. Ross, supra, 456 U.S. at pp. 804-809.) Such action demonstrates a steadfast refusal to follow this Court's interpretation of the United States Constitution.

This case demonstrates the critical importance of the reason underlying the exception. Obviously, if mobility is the primary reason for the vehicle exception an operable motor home, like the one in this case, would be subject to the exception. A contrary result was reached in this case because it was analyzed by the court purely on a privacy theory, completely ignoring mobility. Thus, it is evident the basis for the vehicle exception is a critical factor in the analysis of vehicle search cases. Defining the basis for the exception is the exclusive province of

this Court, and this Court has defined the exception as one based on mobility. The California Supreme Court's disagreement on this point cannot survive.

One reason for the California Supreme Court's mistaken interpretation of the basis for the exception is demonstrated by its characterization of the exception as an "automobile exception" instead of a vehicle exception. Though commonly referred to as the automobile exception, Chief Justice Taft announced a vehicle exception in Carroll v. United States.

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be

construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." (Carroll v. United States, supra, 267 U.S. at p. 149, emphasis added.)

The rationale for the rule underscores its application to all vehicles.

"We have made a somewhat extended reference to these statutes to show that the guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be

sought." (Carroll v. United States, supra, at p. 153, emphasis added.)

The application of the Carroll rule to vehicles and vessels other than automobiles further demonstrates mobility is the true basis for the exception. (See, United States v. Montgomery (10th Cir. 1980) 620 F.2d 753, 760, (warrantless search of an airplane and camper); United States v. Cadena, supra, 588 F.2d at p. 102, (search of a ship); United States v. Lovenquith, supra, 514 F.2d at p. 99 (search of a camper); United States v. Miller, supra, 460 F.2d at p. 585, (search of a fully self-contained Econoline van); and United States v. Rodgers (5th Cir. 1971) 442 F.2d 902, 904, (search of camper).) Without question, the exception is based upon the inherent mobility of the vehicle and the exception applies to every operable

vehicle in use, be it an automobile, a motor boat, or a Conestoga Wagon, the 19th century equivalent of a motor home.

Petitioner does not suggest expectation of privacy does not have a place in the analysis of a vehicle search. Indeed, the lack of a reasonable expectation of privacy serves as an independent justification for a warrantless search. (Arkansas v. Sanders (1979) 442 U.S. 753, 761.) Once a vehicle has been rendered immobile, expectation of privacy becomes a factor for consideration in evaluating the propriety of a warrantless search. (See, South Dakota v. Opperman (1976) 428 U.S. 364, 368; Cady v. Dombrowski (1973) 413 U.S. 433, 441-442.) However the vehicle in this case was clearly not rendered immobile. Furthermore, petitioner is aware of no authority prior to

the California Supreme Court's decision in this case, which has held expectation of privacy totally supplants mobility as the touchstone for analysis of a warrantless search of an occupied vehicle in a public place. It is critical for this Court to grant petitioner's writ of certiorari to insure the vehicle exception to the Fourth Amendment's warrant requirement is properly and consistently applied in all the courts of this land.

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II

PETITIONER'S WRIT OF
CERTIORARI SHOULD BE
GRANTED TO RESOLVE A
CONFLICT IN THE FEDERAL
CIRCUIT COURTS OF APPEALS
AS TO THE BASIS FOR THE
VEHICLE EXCEPTION

The California Supreme Court
is not the only appellate court in the
country to hold expectation of privacy
has supplanted mobility as the basis for
the vehicle exception. The Ninth Circuit
Court of Appeals held a motor home is not
subject to the vehicle exception because
of the heightened expectation of privacy
associated with the vehicle. (United
States v. Williams (9th Cir. 1980) 630
F.2d 1322, 1326; accord, United States
v. Wiga (9th Cir. 1981) 662 F.2d 1325,
1329.) Williams and Wiga provide a
stark contrast to cases from the other
federal circuits and prior Ninth Circuit
cases which apply the mobility analysis

of Carroll v. United States, supra, 267 U.S. at page 153, to searches of vehicles and vessels capable of serving as one's home. (In the Tenth Circuit, United States v. Montgomery, supra, 620 F.2d at p. 760; United States v. Miller, supra, 460 F.2d at p. 585; in the Ninth Circuit, United States v. Lovenuth, supra, 514 F.2d at p. 99; United States v. Gonzalez-Rodriguez (9th Cir. 1975) 513 F.2d 928, 931; in the Sixth Circuit, United States v. Cusanelli, supra, 472 F.2d at p. 1206; and in the Fifth Circuit, United States v. Cadena, supra, 588 F.2d at pp. 101-102; United States v. Clark (5th Cir. 1977) 559 F.2d 420, 423-424; United States v. Rodgers (5th Cir. 1971) 442 F.2d 902, 903.) This schism in the circuits serves as an independent and compelling justification for the granting of petitioner's writ.

III

THE CALIFORNIA SUPREME COURT'S FAILURE TO DEFINE "MOTOR HOME" IS CONTRARY TO THE NEED TO PROVIDE LAW ENFORCEMENT WITH WORKABLE GUIDELINES BY WHICH TO REGULATE THEIR CONDUCT

The Fourth Amendment of the United States Constitution as applied to the states by the Fourteenth Amendment protects individuals from unreasonable searches and seizures. A police officer, who is not trained to make fine legal distinctions must nonetheless insure his conduct in searching a vehicle is reasonable. Guidance for the officers is essential. An indisputable need for clear standards or "brightlines" to guide the conduct of police in vehicle searches has been articulated by this Court and by the California Supreme

Court. (New York v. Belton (1981) 453 U.S. 454, 458; United States v. Ross, supra, 456 U.S. at pp. 803-804; People v. Chavers, supra, 33 Cal.3d at p. 469.)

Flying in the face of this pressing need for stability in search cases is the California Supreme Court's steadfast refusal to define the term "motor home." (People v. Carney, supra, 34 Cal.3d at p. 614 (dissenting opinion); appen. A, pp. 46-47.) The California Supreme Court has thus created a constitutionally significant class of vehicles, without providing a useable definition of the class.

The term "motor home" defies objective definition. The California Supreme Court simply concluded a motor home is a "hybrid" between a motor vehicle and a home. (People v. Carney, supra, at p. 606; appen. A, p. 17.)

Such a characterization is of no help to law enforcement officers who must now distinguish between motor homes and motor vehicles. The particular hybrid referred to by the court has the characteristics of a chameleon and covers the entire range of vehicle configurations. A subcompact car where the driver keeps a sleeping bag may be "home" just as the Winnebago with interior plumbing, refrigeration and sleeping for six may simply provide transportation. Present use and subjective intent of the user of the vehicle is the critical factor to the characterization of a vehicle as a motor home. Unlike mobility, such factors are not subject to objective confirmation.

On a daily basis law enforcement will come in contact with every imaginable vehicle in innumerable situations. They will be expected to

make reasonable decisions regarding search and seizure based upon objective factors. Yet, in vehicle search cases the California Supreme Court has taken away the brightline of mobility as the basis for the search and replaced this brightline with the fuzzy concepts of present use and intent. By erasing the brightline, this case does little but announce a new search and seizure issue which will require law enforcement to work "at risk" and will both encourage and require years of litigation to fashion a workable rule. This rule was announced under the guise of the Fourth Amendment of the United States Constitution. In light of the acknowledged need for brightlines, it is vitally important to the citizens of all states and to law enforcement officials for this Court to ensure a workable, readily

definable rule to apply to all vehicle searches.

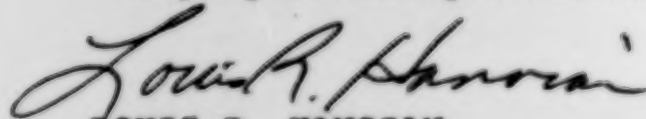
CONCLUSION

For the foregoing reasons petitioner respectfully submits that the writ of certiorari should issue to review the decision of the Supreme Court of the State of California.

Respectfully submitted,

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A P P E N D I X A

APPENDIX A

[Filed September 8, 1983]

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

No. CRIM 22047

Superior Court No. CR 47927

OPINION

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES R. CARNEY,

Defendant and Appellant.

Defendant was charged with possession of marijuana for sale. (Health & Saf. Code, § 11359.) After unsuccessful motions to suppress evidence seized from his motor home, defendant pleaded nolo contendere and was

SEE DISSENTING OPINION

granted probation. He appeals from that order.

The major issue presented is whether the warrantless search of defendant's motor home was justified by an exception to the warrant requirement. The People seek to justify the search on two alternate theories: (1) the automobile exception and (2) the protective sweep exception.^{1/} We conclude that neither of these proposed justifications is applicable under the facts of this case and hence the order must be reversed.

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1. The People have apparently abandoned their contention, raised below, that the motor home was validly searched as an "instrumentality of the crime." In any event, our decision in *People v. Minjares* (1979) 24 Cal.3d 410, 421-422, explicitly rejected this argument.

I

Agent Robert Williams of the Drug Enforcement Administration undertook a surveillance of suspected drug dealer Lee Bowman in the Horton Plaza area of downtown San Diego. Williams noticed defendant because "he did not look like he fit in the area there, and he was approaching a Mexican boy and talking to him." Defendant and the youth walked to a nearby parking lot, entered a Dodge motor home parked there and closed the curtains, including one across the front window.

Williams noted the license plate number of the motor home and recalled having received uncorroborated information from which he inferred that defendant "had taken the place of the person [i.e., Bowman] we were following and [that he was] dealing narcotics."

The information was furnished by an organization called "WeTip" (We Turn in Pushers); it suggested that the motor home was associated with an individual who reportedly was exchanging marijuana for sex.

Additional officers, including an agent by the name of Clem, arrived in response to a request by Williams. The motor home was kept under surveillance during the entire hour and a half that defendant and the youth were inside. After the youth left the motor home the officers followed, stopped and questioned him. He told them the occupant of the motor home had given him marijuana in exchange for allowing the man to perform oral copulation on him.

The youth then complied with the officers' request that he return to the motor home, knock on the door, and

ask defendant to come out. Defendant answered the door and as he stepped out of the motor home, the agents identified themselves as law enforcement officers. Agent Clem entered the motor home; inside he observed marijuana, ziploc bags, and a scale on a table. On the basis of Clem's observations, Williams arrested defendant, seized the motor home, and drove it to the police station. A subsequent search of the motor home revealed additional marijuana in the cupboards and refrigerator.

At the preliminary hearing defendant moved to suppress the evidence seized from both searches of the motor home. The motion was denied by the magistrate on the ground that as to the initial search, Agent Clem had the right to enter to look for other persons; the more thorough second search was upheld

as a standard inventory search. Defendant unsuccessfully renewed his suppression motion in the superior court, which found that (1) there was sufficient probable cause to arrest defendant; (2) the search of the motor home was authorized under the automobile exception; and (3) the motor home itself could be seized as an instrumentality of the crime.

II

Article I, section 13, of the California Constitution establishes the right of the people of this state to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The Fourth Amendment provides a similar guarantee. This protection has repeatedly been interpreted to require the impartial approval of a judicial officer before undertaking most searches. (Payton v. New York (1980))

445 U.S. 573, 583-585; People v. Dalton (1979) 24 Cal.3d 850, 855.) "In the ordinary case . . . a search of private property must be both reasonable and pursuant to a properly issued search warrant." (Arkansas v. Sanders (1979) 442 U.S. 753, 758.)

The importance of the judicial warrant cannot be overemphasized: "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are

a part of any system of law enforcement'

. . . . By requiring that conclusions concerning probable cause and the scope of a search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' [citation], we minimize the risk of unreasonable assertions of executive authority." (Id. at pp. 758-759.)

Thus, searches conducted without the benefit of the judicial warrant process are "'per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.'" (Mincey v. Arizona (1978) 437 U.S. 385, 390, quoting Katz v. United States (1967) 389 U.S. 347, 357; accord, People v. Minjares, supra, 24 Cal.3d at p. 416.)

It is against this background that we examine defendant's challenge to the warrantless search of the living compartment of his motor home. If that search is to be upheld, it is the state's burden to show that it falls within one of the "few carefully circumscribed and jealously guarded exceptions" (People v. Dalton, supra, 24 Cal.3d at p. 855) to the warrant requirement. (People v. Dumas (1973) 9 Cal.3d 871, 881; Arkansas v. Sanders, supra, 442 U.S. at p. 760; McDonald v. United States (1948) 335 U.S. 451, 456.)

In the present case the state seeks to justify the search primarily under the so-called "automobile exception." Our formulation of the controlling principles of that doctrine provides that "officers are empowered . . . to search an automobile as 'long

as it can be demonstrated that (1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search.'" (Wimberly v. Superior Court (1976) 16 Cal.3d 557, 563.)

The "automobile exception" had its genesis in Carroll v. United States (1925) U.S. 132; it has since been expanded and extensively litigated to the point that this area of search and seizure law is now characterized as "troubled" (United States v. Ross (1982) 798, ____ [72 L.Ed.2d 572, 589]) and "something less than a seamless web" (Cady v. Dombrowski (1973) 413 U.S. 433, 440). The court in Carroll premised its analysis on the notion that there is a constitutional difference between houses and cars. The underlying

rationale for this distinction was the inherent mobility of automobiles. (Carroll, supra, 267 U.S. at p. 153; Cooper v. California (1967) 386 U.S. 58, 59; see also Katz, Automobile Searches and Diminished Expectations in the Warrant Clause (1982) 19 Am.Crim.L.Rev. 557, 563-565 (hereafter referred to as Katz).) California courts have independently relied on similar reasoning. (People v. Laursen (1972) 8 Cal.3d 192, 201; People v. McKinnon (1972) 7 Cal.3d 899, 907; People v. Odom (1980) 108 Cal.App.3d 100, 107.)

Although subsequent decisions have purported to rely on the mobility justification, the courts have recognized that this reasoning alone fails to support their sustaining of "warrantless searches of vehicles . . . in cases in which the possibilities of the

vehicle's being removed or evidence in it destroyed were remote, if not non-existent." (Cady v. Dombrowski, supra, 413 U.S. at pp. 441-442; accord, United States v. Chadwick (1977) 433 U.S. 1, 12; South Dakota v. Opperman (1976) 428 U.S. 364, 367.) This is demonstrated first by the line of cases in which warrantless searches were upheld regardless of the automobile's actual mobility, e.g., where there was no immediate danger that the vehicle would be removed from the jurisdiction. (See, e.g., Cady, supra, 413 U.S. 433 [car, disabled as result of accident, in control of police; driver, sole occupant, arrested and hospitalized]; Chambers v. Maroney (1970) 399 U.S. 42 [occupants of car arrested and car taken to police station]; Cooper v. California (1967) 386 U.S. 58 [defendant arrested and car

impounded].) Conversely, another line of decisions disapproves certain warrantless searches of containers despite the recognition of their "mobility."

(Sanders, supra, 442 U.S. 753 [suitcase in trunk of car]; Chadwick, supra, 433 U.S. 1 [footlocker in trunk of car]; People v. Minjares, supra, 24 Cal.3d at p. 418 [real, rather than theoretical, exigencies are required before luggage may be searched without a warrant]; see also United States v. Ross, supra, 456 U.S. at p. ____ [72 L.Ed.2d at pp. 584-586, 592-593] [containers in cars in which there is probable cause to believe contraband is being transported determined to be less protected than containers in other settings]; but see

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Coolidge v. New Hampshire (1971) 403 U.S. 443, 461, fn. 18.)^{2/}

In the face of this apparent volatility, the courts have recognized that mobility is no longer the prime justification for the automobile exception; rather, "the answer lies in the diminished expectation of privacy which surrounds the automobile." (Chadwick, supra, 433 U.S. 1, 12; People v. Minjares, supra, 24 Cal.3d at p. 418; see also Katz, op. cit. supra, 19 Am.Crim.L.Rev. at pp. 564-572; State v. Bottelson (Idaho 1981) 625 P.2d 1093, 1096.)^{3/} A variety of factors that

2. For a thoughtful discussion of the development of the "automobile exception," see Note, Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule (1982) 68 Cornell L.Rev. 105.

3. This reasoning is not undermined by United States v. Ross, supra,

that reduce the expectation of privacy
in automobiles have been identified

Footnote 3 continued:

the most recent Supreme Court decision to address the "automobile exception." In Ross, the court was called upon to resolve the conflict, which is involved in every case in which an automobile is stopped on a highway or public street, "between the individual's constitutionally protected interest in privacy and the public interest in effective law enforcement." (456 U.S. at p. ____ [72 L.Ed.2d at p. 580].) The court suggested that an "individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." (Id. at pp. 592-593.) Thus, it held that "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (Id. at p. 594.) This holding signals a retreat from the earlier "container" cases without overruling them entirely. As one commentator has paraphrased it, under the new rule "when police officers have probable cause to stop an automobile on the street and the object of their search is not some specifically identifiable container known to be inside, they may search the entire car and open any package or container the officers find inside whether they have a search

by the courts. "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects It travels public thoroughfares where both its occupants and its contents are in plain view." (Italics

Footnote 3 continued:

warrant or not." (Note, United States v. Ross: Search and Seizure Made Simple (1983) 10 Pepperdine L.Rev. 421, 446.)

This expansion of the scope of automobile searches has no relevance to the issue raised by the case at hand if we determine that the justifications for the "automobile exception" are inapplicable to motor homes. The only aspect of Ross that relates to the present case, therefore, is the extent to which the court expresses a continued concern for expectations of privacy in the search and seizure area. As discussed above, although Ross holds there is a lowered expectation of privacy in automobiles and containers placed in automobiles, this does not signal a retreat from the general principles of expectations of privacy in other settings such as those presented by the case at bar.

added.) (Cardwell v. Lewis (1974) 417 U.S. 583, 590.) In other words, "the expectation of privacy as to automobiles is . . . diminished by the obviously public nature of automobile travel." (South Dakota v. Opperman, supra, 428 U.S. at p. 368; see also Rakas v. Illinois (1978) 439 U.S. 128, 154, fn. 2 (conc. opn. by Powell, J.).) Moreover, "automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls" which adds to the lessened expectation of privacy. (Id.; accord, United States v. Chadwick, supra, 433 U.S. 1, 12-13.)

In the present case, we are called upon to apply this reasoning to a hybrid -- a motor home -- which has the mobility attribute of an automobile combined with most of the privacy characteristics of a house. Defendant

maintains that the factors discussed above that dilute the expectation of privacy in automobiles do not so affect the privacy interests in a motor home. We agree.

First and foremost, unlike an automobile the primary function of a motor home is not transportation. Motor homes are generally designed and used as residences; their essential purpose is to provide the occupant with living quarters, whether on a temporary or a permanent basis. Both Vehicle Code section 396 and Health and Safety Code section 18008 refer to a mobilehome not as a vehicle but as a transportable "structure." The motor home at issue here was equipped with at least a bed,

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a refrigerator, a table, chairs, curtains and storage cabinets.^{4/} Thus the contents of the motor home created a setting that could accommodate most private activities normally conducted in a fixed home. The configuration of the furnishings, together with the use of the motor home for all manner of strictly personal purposes, strongly suggests that the structure at issue is more properly treated as a residence than a mere automobile.

Homes are afforded the maximum protection from warrantless searches and

4. The record does not disclose what other fixtures, furnishings or appliances (i.e., stove, sink, etc.) were installed in this particular motor home. Amicus implies that it also had bathing and toilet facilities, but the record is silent on the point. Although a more complete record would have been helpful, its omission does not bar us from concluding that defendant's motor home is more akin to living quarters than to a mere mode of transportation.

seizures. (People v. Ramey (1976) 16 Cal.3d 263, 271, 273-276; People v. Dumas, supra, 9 Cal.3d at p. 882, fn. 8.) The "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (Payton v. New York, supra, 445 U.S. at p. 585.) The fact that a motor home is not affixed to real property does not demean its protected status as a house.

"The concept that a man's home is his castle is an ancient one. It has had a profound effect upon our legal history. Its application to the innocent and the guilty, the rich and the poor is no figment of the imagination of modern-day judges." (United States v. Nelson (6th Cir. 1972) 459 F.2d 884, 885.) The classic exhortation of William Pitt, Earl of Chatham, bears

repetition: "'The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter, the rain may enter; but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement!'" (Quoted in *Miller v. United States* (1958) 357 U.S. 301, 307.) The principal function of the structure here was to provide living quarters rather than a means of transportation; furthermore, this function was reasonably apparent from the exterior of the motor home. For these reasons, it is entitled to a degree of protection similar to that accorded an Englishman's cottage or "ruined tenement."^{5/}

5. In *People v. Dumas*, supra, 9 Cal.3d at page 882, footnote 9, we cited

We recognize that motor homes are commonly used as temporary living quarters for vacations or other short-term visits away from one's primary residence. This factor, however, does not diminish the reasonable expectation of privacy. "No less than a tenant of a house, or the occupant of a room in a

Footnote 5 continued:

United States v. Miller (10th Cir. 1972) 460 F.2d 582, as holding that a "mobile camper van" is to be accorded protection similar to that given an automobile. This reference, however, was merely part of a review of the law of other jurisdictions in various related fact situations; we did not intend thereby to express any approval of the holding in Miller. In any event, the Miller court did not undertake an expectation of privacy analysis, but instead upheld the search under the "totality of the facts and circumstances." (Id. at p. 586.) Furthermore, Miller was decided prior to Chadwick, supra, which significantly altered the federal constitutional analysis to be applied to automobile search cases. For these reasons, Miller is not persuasive authority on the question presented here.

boarding house, [citation] a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." (Stoner v. California (1964) 376 U.S. 483, 490; accord, People v. Escudero (1979) 23 Cal.3d 800, 807.)

It is established beyond question that those who stay temporarily in hotels or motels while away from their permanent residences are protected from intrusions into the privacy of such temporary living quarters (ibid.); no pervasive reason has been suggested why persons who rely on motor homes for such shelter should be penalized by depriving them of similar protections.

In this same vein, although an automobile may seldom be used as a repository of intimate effects, the same characteristic is not true of a motor home. To the extent an individual uses

a motor home as his permanent or temporary residence, it, as much as a house, serves as his "place of refuge" in which he should be "free from unreasonable governmental intrusion." (Silverman v. United States (1961) 365 U.S. 505, 511.) In this sense, a motor home often serves as a repository for personal effects to the same degree as a home, an office, or certainly a piece of luggage.

Finally, unlike a car, the interior and contents of an ordinary motor home are not generally exposed to the public, nor are the occupants, the furnishings or any personal effects in plain view. The decisions of the Supreme Court "have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his

privacy.' [Citations.] . . . [¶] [I]t is [therefore] the right to privacy that is the touchstone of our inquiry."

(Cardwell v. Lewis, supra, 417 U.S. at pp. 589, 591; see also Katz v. United States, supra, 389 U.S. at pp. 351-352.)

The interior of a motor home is often fully shielded from view by its design: the windows, if any, are generally so small or placed in such a manner that little or none of the interior can be seen by a person standing outside.

Moreover, whatever view exists may be blocked by window coverings such as shades, curtains, or blinds. Regardless of its particular configuration, however, in the case of a motor home as with a fixed house the issue is whether the occupant manifests an objectively reasonable expectation of privacy in the interior. Defendant's expectation

of privacy in the motor home here was clearly justifiable.

In a recent decision the Ninth Circuit has also held the "automobile exception" inapplicable to a motor home. (United States v. Williams (9th Cir. 1980) 630 F.2d 1322, 1326.) In Williams, border patrol agents detained an automobile that had been travelling with a Pace Arrow motor home; the agent suspected the car might be transporting illegal aliens. The driver of the car directed the agent to the motor home to obtain a key for the car's trunk; occupants of the motor home denied any knowledge of the key or the car. The agents broke into the trunk of the car and discovered contraband and substances used in the manufacture of contraband. One agent, suspicious of the association between the car and the motor home,

returned to the motor home, which had moved in the interim, and arrested its occupants. Five hours later, narcotics agents arrived and searched the motor home without a warrant.

The court held this search could not be justified under the "automobile exception" because of the greater expectation of privacy associated with a motor home: "The vehicle in question was not an ordinary automobile but a motor home. Whatever expectations of privacy those travelling in an ordinary car have, those travelling in a motor home have expectations that are significantly greater. People typically do not remain in an auto unless it is going somewhere. The same is not true of a motor home, in which people can actually live. In the ordinary motor home, the glass is tinted or shades can be drawn

so that passers-by cannot peer in. Moreover, many, like the one in this case, have beds and fully equipped baths, making them in some senses more akin to a house than a car. In light of . . . these factors, we cannot uphold this search merely because it was a search of a motor home." (Ibid.)^{6/}

At the very core of the Fourth Amendment protection against warrantless searches stands the right of an individual to retreat into his own home and there be free from unreasonable government intrusion. An individual "can still control a small part of his environment, his house; he can retreat

6. Ultimately the court upheld the search on the basis of exigent circumstances of danger arising from the special risks associated with the manufacture of a particular controlled substance under these conditions (i.e., the presence of volatile chemicals). (Id. at p. 1327.)

thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution.

. . . A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.'" (Silverman v. United States,

supra, 365 U.S. 505, 511-512, fn. 4.)

These principles hold true no less for the home resting on wheels than for the home resting on a cement foundation. In that the outward appearance of the motor home here would have alerted a reasonable person to believe it was likely to be serving as at least a temporary residence, it was entitled to the protections traditionally given to a home.^{7/}

7. Of course, even if the function of the structure or vehicle is not

Accordingly, we conclude that a motor home is fully protected by the Fourth Amendment and is not subject to the "automobile exception." Of course this does not preclude all warrantless searches of motor homes; it simply means that such searches cannot be justified by that particular exception to the warrant requirement.^{8/} We therefore proceed to inquire into the remaining

Footnote 7 continued:

apparent from its exterior, the protections will come into play at whatever point a reasonable person would realize that the place being searched is serving as a home (e.g., from its furnishings or other residential accoutrements.)

8. We note in this respect that the People present no cognizable claim of "exigent circumstances" independent of the automobile exception itself. In that the incident occurred on a weekday afternoon while the motor home was parked within a few blocks of the courthouse, it would have been quite simple for the officers to seek a warrant from a magistrate and to have thereby avoided all their present difficulties.

justification for the search offered by the People.

III

The People next assert that their initial search of the living quarters of defendant's motor home should be upheld as a "protective sweep" for other suspects who might endanger the law enforcement officers or destroy evidence. On the record before us this purported justification must fail.

Defendant contends the protective sweep theory is being raised for the first time on appeal and must therefore be disregarded. (See *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640; *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 198-199.) He concedes the argument was made by the People at the preliminary hearing, but maintains that their failure to renew it in superior

court bars them from asserting it on appeal. In the circumstances of this case, the point is not well taken. First, the record does not support defendant's version of the superior court hearing: at that hearing the district attorney, although not arguing the point, expressly stated that "we are not conceding the fact that the officer had no right to look for other suspects, because I think he had every right to protect himself by doing just that. The points and authorities just point out there are a number of different theories upon which the search . . . can be justified."

Second, the parties agreed to make the preliminary hearing transcript a part of the record in the superior court proceeding. "While it is preferable for the prosecution to set forth

its justification for a warrantless search . . . in its responses to the defendant's motion to suppress evidence, the People's theory or justification can be determined from the evidence and argument offered." (People v. Whyte (1979) 90 Cal.App.3d 235, 242; see also People v. Manning (1973) 33 Cal.App.3d 586, 601.) One rationale for the rule prohibiting the People from raising a new justification on appeal is that to allow them to do so would "deprive the defendant of a fair opportunity to present an adequate record in response." (People v. Superior Court (Simon), supra, 7 Cal.3d at p. 198; accord, People v. Miller (1972) 7 Cal.3d 219, 227.) The People here advanced the protective sweep theory at the preliminary hearing; in fact the magistrate apparently ruled in the People's favor on

that ground. Defendant had the opportunity to, and did, attack the proposed justification at that time. The full record of the preliminary hearing reflecting these arguments and counterarguments was before the superior court when it ruled on the suppression motion. Under these circumstances, there is no bar preventing the People from now urging the point.

We turn therefore to the substance of the People's protective sweep justification. In *People v. Block* (1971) 6 Cal.3d 239, we articulated the rule that under certain limited circumstances warrantless searches for additional suspects are permissible. In Block, police officers arrested defendant and a number of other people during a well-attended "pot party"; one officer then went upstairs in search of

other possible suspects, and while there observed marijuana in plain view. We held that the facts known to the officer (i.e., presence of six or seven persons downstairs at a "pot party" involving an undetermined number of participants; lights on upstairs) supported a reasonable belief that additional culpable persons might be in the house; the officer's search was therefore reasonable.

We emphasized, however, that a determination of the reasonableness of the officer's actions was "dependent upon the existence of facts available to him at the moment of the search or seizure which would warrant a man of reasonable caution in the belief that the action taken was appropriate.

[Citation.] And in determining whether the officer acted reasonably, due weight

must be given not to his unparticularized suspicions or 'hunches,' but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary." (Id. at p. 244.)

In Dillon v. Superior Court (1972) 7 Cal.3d 305, we applied Block and held that the circumstances presented did not justify a search for other suspects. There, police officers investigating reports of marijuana cultivation in a backyard accompanied the defendant to the suspected location behind the house and arrested her. The defendant then went inside the house to make a phone call, again accompanied by the officers. The officers, over the

defendant's objection, searched the entire house and located contraband.

We held that the information known to the officers did not constitute "sufficient and articulable facts" to justify the search: "None of the officers testified that he was in fear of his life or safety. The detective in charge admitted that he had no specific articulable information that any suspects were in the house at that moment; only general information that two other persons had been living at the house." (Id. at p. 313.) We concluded that "the mere possibility of additional persons in the house, without more, is not enough to provide probable cause to search the entire premises for additional suspects. . . . [¶] [T]he mere fact that the marijuana plants were found in the backyard and that two

others had been living at the house, without additional facts, does not furnish probable cause to believe that others may be present in the house." (Id. at p. 314.)

Federal law applies a similar standard and allows protective sweep searches only "when the officers reasonably believe that there might be other persons on the premises who could pose some danger to them." (*United States v. Gardner* (9th Cir. 1980) 627 F.2d 906, 909-910, and cases cited; accord, *United States v. Allen* (9th Cir. 1980) 675 F.2d 1373, 1382; *United States v. Bowdach* (5th Cir. 1977) 561 F.2d 1160, 1168-1169.) The underlying rationale for the protective sweep doctrine is, of course, the exigent circumstances exception to the warrant requirement: "When police officers, acting on probable cause and

in good faith, reasonably believe from the totality of circumstances that (a) evidence or contraband will imminently be destroyed or (b) the nature of the crime or character of the suspect(s) pose a risk of danger to the arresting officers or third persons, exigent circumstances justify a warrantless entry, search or seizure of the premises."

(Pns. omitted; italics added.) (United States v. Kunkler (9th Cir. 1982) 679 F.2d 187, 191-192; accord, United States v. Gardner (5th Cir. 1977) 553 F.2d 946, 948; United States v. Guidry (6th Cir. 1976) 534 F.2d 1220, 1222-1223; see also People v. Ramey, supra, 16 Cal.3d at p. 276.)

Applying the foregoing principles to the case at hand, we conclude that the facts presented did not justify the warrantless entry of the motor home.

As we have noted herein, the burden is on the People to establish that a warrantless search was justified under an exception to the warrant requirement. Thus, to the extent the People relied on the protective sweep theory, it was their burden to show that the officers were aware of specific, articulable facts from which they could reasonably infer other suspects were in the motor home.

In essence, the People contend that the WeTip letter sufficiently justified a reasonable belief that other suspects might be present. This letter purportedly (1) linked the motor home to drug dealing activities, and (2) indicated that Lee Bowman was customarily using the motor home for such activities. We note first that the WeTip letter was based on uncorroborated

anonymous information, not a justifiable basis, without more, for specific and articulable suspicions. Second, the reference to Bowman in the letter had no relevance to whether he was inside the motor home at the time defendant was arrested. In Dillon, we held that the mere possibility that others might be inside the house based on the fact more than one person lived there was insufficient to support a protective sweep search. In the present case there was even less support: the WeTip information was of marginal reliability, and even if relied on, it indicated only a possible association of Bowman to the motor home. Bowman's tenuous connection to the motor home provides little support for a reasonable belief that he lived there or that he was present at the time of defendant's arrest. Indeed,

Agent Williams testified he believed defendant "had taken the place" of Bowman.

Moreover, the motor home had been under surveillance for over an hour and no one except defendant and the youth had entered or left. None of the officers testified that they had any reason to believe there were other suspects inside or that they did in fact subjectively believe this was the case. Furthermore, the record is silent as to whether the officers questioned the youth to discover if there were others inside, and if they did, what his response was. Had the officers been truly concerned for their safety, it would have been elementary for them to have asked the person who had just left the motor home how many people were

inside.^{9/} Thus, the People failed to establish that the officers had a reasonable belief, grounded on specific articulable facts, that other persons were inside the motor home.^{10/} The People's attempt to justify the search

9. This is not to say, of course, that had the youth stated defendant was alone, the officers would have been required to trust his response. It appears likely, however, that if the officers believed the boy's admission that he received marijuana for sex, there would be little reason to disbelieve a far less incriminatory statement as to the number of occupants in the motor home. In any event, any response would simply have been another factor for the officers to consider in determining whether there was reasonable cause under the totality of the circumstances to believe others were inside the motor home.

10. We also note that none of the officers even alluded in his testimony to a suspicion that evidence or contraband was in danger of imminent destruction. We conclude therefore that the People did not rely on potential destruction of evidence as part of their justification for the protective sweep search.

on the basis of the protective sweep exception must, therefore, be rejected.^{11/}

In light of the foregoing, the order of probation is reversed and the

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11. Because of our conclusion in parts II and III, ante, that the initial warrantless search of the motor home was not justified by an exception to the warrant requirement, we need not reach the issue of the validity of the subsequent search. In any event, the burden, of course, would be on the People to justify this additional warrantless search. The only argument asserted by the People on this point, however, relies solely on the validity of the initial search of the motor home; i.e., the People contend that the marijuana and paraphernalia found as a result of the first search provided probable cause to believe additional contraband would be found inside the motor home. Our holding that the initial search was unreasonable leads inevitably to the conclusion that its fruits cannot be used to justify the subsequent search.

case is remanded to the trial court to permit defendant to withdraw his plea and for further proceedings consistent with this opinion. (People v. Miller (1983) 33 Cal.3d 545, 556.)

MOSK, J.

WE CONCUR:

BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.

C O P Y

PEOPLE v. CARNEY

Crim. 22047

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent.

In my view, under the facts of the present case the officer's search of defendant's vehicle was valid by reason of the "automobile exception" to the warrant requirement. (See *People v. Chavers* (1983) 33 Cal.3d 462.) The majority holds, however, that "a motor home . . . is not subject to the 'automobile exception.'" (*Ante*, p. ____ [maj. opn., at p. A-30 [p. 16 of orig. opn.]]) Considering the necessity for careful guidance to law enforcement, I have several objections to that generalization.

First, the majority fails to define its terms. What precisely are "motor homes"? They are almost

infinitely variable in size, shape, design, access, and visibility. Some of the smaller ones are the most enclosed. Others are separately attached as trailers, while still others have direct access from the driver's cab. Is a camper or recreational vehicle a "motor home"? What about a large van or truck? As we explained so recently in Chavers, "there is a demonstrable need for clear guidelines by which the police can gauge and regulate their conduct, rather than a complex set of rules dependent upon the particular facts" (33 Cal.3d at p. 469.) Although the majority uses the term as if it were readily understood, I find no definition either in statute or dictionary.

Moreover, the majority implies that any motorized vehicle which also serves as a "residence" would be

afforded constitutional protection as a "motor home." Some people live in the cab of a truck. For others, "home" may be a sleeping bag thrown in the back of a pickup truck. The interior of many vehicles is obscured by tinted glass or shades or venetian blinds. Does this fact alone establish the vehicle as a "residence" for Fourth Amendment purposes? If it does not, how then are police officers to determine that a protectible "residential" use actually exists without first entering the vehicle? If a motor home is a residence, what is the address of the residence?

We are concerned, here, with matters of degree. I fully agree that definitions are difficult and that those who "reside" or "live" in a motorized vehicle have a heightened expectation

of privacy, but broad generalizations are not useful. While protecting the citizens from unreasonable police intrusions, we also should recognize the difficulty facing law enforcement in balancing its obligation to protect the general public from criminal depredation.

In my view, if the facts reasonably indicate to the investigating officers that the vehicle is currently being used primarily as a residence rather than for transportation purposes, then the "automobile exception" would be inapplicable. Such residential use might be indicated by the attachment to exterior utility services, for example. On the other hand, if the facts reasonably disclose no such residential use, or if they indicate that such use is

secondary or collateral to transportation purposes, then the exception should apply. The reason for the "exigency" exception, the full mobility of a motor vehicle, has equal application to "motor homes." With most motor homes, the "residence" can be three states away in a matter of hours.

In the present case, defendant's "motor home" was parked on a weekday afternoon in a downtown vehicular public parking lot near commercial enterprises, rather than in a neighborhood mobile home park or other usual facility indicating current residential use. To me, a "motor home" parked in a public parking lot is more "vehicle" than "residence." Of course, it may be both and I readily acknowledge that we are working in gray areas. However, given the time of day and the location

- A-51 -

of defendant's vehicle, the officers reasonably could assume that it was then being used primarily, predominantly and principally for transportation uses. Accordingly, the search was valid.

I would affirm the judgment.

RICHARDSON, J.

PEOPLE v. CHARLES R. CARNEY

Crim. 22047

COUNSEL FOR THE PARTIES:

FOR APPELLANT/PETITIONER:

Thomas F. Homann
1168 Union St., Suite 201
San Diego, CA 92101
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FOR RESPONDENT:

Louis R. Hanoian
Office of the Attorney
General
110 West A Street
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SUPERIOR COURT: San Diego

SUPERIOR COURT NO.: CR 47927

SUPERIOR COURT JUDGE: Honorable
William T. Low

A P P E N D I X B

APPENDIX B

[Filed October 6, 1983]

Order Due

October 7, 1983

ORDER DENYING REHEARING

Crim. No. 22047

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

CHARLES R. CARNEY

Application for stay of
issuance of remittitur DENIED.

Respondent's petition for
rehearing DENIED.

Richardson, J., is of the
opinion the petition should be granted.

[signed] BIRD
Chief Justice

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
LOUIS R. HANOIAN
Deputy Attorney General

No: _____

PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner

v.

110 West A Street, Suite 700
San Diego, California 92101

CHARLES R. CARNEY,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing 3 copies in a separate envelope addressed for and to each addressee named as follows:

Thomas F. Homann
Attorney at Law
1168 Union Street, Suite 201
San Diego, CA 92101

George L. Schraer
Deputy State Public Defender
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San Diego Superior Court
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San Diego, CA 92101

Laurence P. Gill, Clerk
Supreme Court of California
350 McAllister Street, Suite 4050
San Francisco, CA 94102

FOR DELIVERY TO:

Hon. William T. Low, Judge

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 23 day of November, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 23, 1983.

Clifford E. Reed
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 23rd day of November, 1983.

Karen K. Lum
Notary Public in and for said County and State



KAREN K. LUM
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My Commission Expires Feb. 02, 1984

Office - Supreme Court, U.S.
FILED
JAN 26 1984
ALEXANDER L. STEVAS.
CLERK

No. 83-859

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CALIFORNIA,

Petitioner,

-vs-

CHARLES R. CARNEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

THOMAS F. HOMANN
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Attorneys for Respondent

BEST AVAILABLE COPY

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- 1 -

No. 83-859

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

CALIFORNIA,

Petitioner,

-vs-

CHARLES R. CARNEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent Charles R. Carney respectfully prays that the petition for writ of certiorari filed by the State of California be denied.

JURISDICTION

The decision of the California Supreme Court in this case, acknowledging reasonable privacy interests in the living quarters of an immobilized motor home in police custody,

rests on adequate and independent state grounds "plainly stated" in the opinion. Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469 (1983). Therefore, this is not a case "arising under" the federal constitution (Article III, section 2) subject to review by this Court pursuant to 28 U.S.C. section 1257(3).

The initial citation of legal authority in the body of the California Supreme Court opinion is Justice Mosk's invocation of Article I, section 13 of the California Constitution which, it is noted, "establishes the right of the people of this state to be secure...from unreasonable searches and seizures." The Court incidently notes "The Fourth Amendment provides a similar guarantee." (Petitioner's Appendix, page A-6.)

While the opinion traces the genesis and evolution of the "automobile exception" to the warrant requirement from Carroll v. United States, 267 U.S. 132 (1925), the

decision explicitly states "California courts have independently relied on similar reasoning" as the federal authorities. (Petitioner's Appendix, page A-11.) The court expressly recognizes the independent basis for California rules regarding searches of vehicles. Instead of casually citing the state constitution and relying "exclusively" on federal cases, Michigan v. Long, supra, the decision here relies extensively on state cases based wholly or in part on the California Constitution and the independent state exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), established before the decision in Mapp v. Ohio, 367 U.S. 643 (1961).^{1/}

Furthermore, a decision adverse to respondent here will not determine the outcome of

^{1/} California Constitution, Article I, section 28(d), enacted in June, 1982 and purporting to eliminate the state exclusionary rule, does not apply to this case which arose prior to the constitutional amendment. People v. Smith, 34 Cal.3d 251, 667 P.2d 149 (1983).

this case since the California Supreme Court remains the final arbiter whether or not to follow this Court's advice on remand. The Court's obligation to avoid rendering opinions only advisory of federal rights, but not determinative of a case or controversy, warrants denial of the petition. Federal interference with this state court decision is not appropriate.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent has never claimed rights protected by the Fifth Amendment are implicated in this case as suggested in the petition, page 3.

STATEMENT OF THE CASE

Respondent Carney was charged in the California Superior Court of San Diego County with a single count of possessing marijuana for sale. Mr. Carney's motion to suppress evidence, claiming the warrantless entry and search of the living compartment of his parked motor home violated California Constitution, Article I, section 13 (as well as the

federal constitution), was denied. Respondent entered a nolo contendere plea to the charge, he was fined \$500.00 and placed on probation for a three year period which expired more than a year ago on January 8, 1983.

Six justices of the California Supreme Court, over a single dissent, reversed the order of probation, finding the warrantless entry and search violated the California Constitution and complementary federal law.

The motion to suppress evidence was litigated on facts presented at a preliminary hearing. The rendition of the facts in the petition is not entirely accurate.

Respondent Carney was observed by Police Officer Williams talking to a person, unidentified in the record, who appeared to be a teenager, the "Mexican boy" referred to by Petitioner. The record fails to disclose this person's age. The "boy" did not testify at the hearing. Later, Williams saw Mr. Carney and the young man walk to a nearby

parking lot and enter a parked Dodge motor home. Neither the nature of the parking lot nor the physical configuration of the motor home are described in the record.

Williams noticed the license plate on the motor home and claimed to recall anonymous information of marijuana exchanged for sex with juveniles by an unidentified male associated with the motor home. The extent of Williams' anonymous information is unclear from the record.

Other police agents including Officer Clem arrived later and watched the motor home with Williams for approximately an hour and a half. When the young man exited the motor home and began walking away, he was stopped and questioned. The record is not clear what questions were asked of the young man and what answers he gave. It is not clear who was present during the questioning and who heard what was said. The young man apparently told Williams the

occupant of the motor home had given him a small bag of marijuana and performed oral copulation on him.

At the officers' request, the young man returned to the motor home, knocked on the door and asked Mr. Carney to step outside. Respondent stepped outside and Officer Clem then entered the living compartment of the motor home allegedly looking for "additional suspects." Once he had entered, Clem observed marijuana and "paraphernalia" on a table inside. Mr. Carney was arrested after Clem's entry to look for more suspects.

The motor home was seized and the entire living compartment was thoroughly searched, including the cupboards, drawers and the refrigerator where additional marijuana was found.

ARGUMENT

THIS CASE IS UNWORTHY OF REVIEW BY THIS COURT

There is no important or compelling reason for review of this unusual case. Obviously no grave error needs correction since Mr. Carney has already successfully satisfied his grant of probation.

This case is unsuited to establish national precedent for several reasons.

The record inadequately sets forth details necessary for refined review by this Court. The physical configuration of the motor home which was the subject of the search is only vaguely described. The record fails to indicate whether the driving compartment was accessible from the living compartment, it incompletely describes the fixtures of the particular motor home, and there is a troubling failure to establish completely the predicate facts leading up to the warrantless entry. Whether the motor home served as respondent's primary residence,

whether the vehicle was parked permanently or only temporarily in the parking lot, whether the parking lot catered to long or short term users, all these questions are unanswered in the record.

In the face of an uncertain record, review should be denied.

Furthermore, the courts are not in disarray with conflicting decisions on the unique question raised in this case. The Ninth Circuit in United States v. Williams, 630 F.2d 1322, 1326 (9th Cir. 1980) and United States v. Wiga, 662 F.2d 1325 (9th Cir. 1981), like the California Supreme Court, has recognized a motor home is mobile, but also recognized a motor home is a dwelling area, a space traditionally entitled to the highest degree of protection from warrantless intrusion. Payton v. New York, 445 U.S. 573 (1980). No case has been cited by Petitioner or found by Respondent which actually considered the privacy interests in a motor home and decided the issue

in conflict with the decisions of the California Supreme Court and the Ninth Circuit.

The "conflicts" cited at page 25 of the petition are illusory. One of the cases listed, United States v. Cadena, 588 F.2d 100 (5th Cir. 1979), explicitly acknowledged the "increased measure of privacy that may be expected" in living quarters on a vessel requires "careful scrutiny" of "the exigency of the circumstances excusing the failure to secure a warrant." The requirement for genuine exigency to excuse the failure to obtain a warrant set forth in Cadena is the same analysis applied in Williams, Wiga and by the California Supreme Court in this case with respect to the living compartment of a motor home.

These cases are consistent with existing law.

This Court has frequently cited a dual rationale for the automobile exception, based in part on inherent mobility of a

vehicle, but also based on the "diminished expectation of privacy" associated with an automobile. United States v. Chadwick, 433 U.S. 1, 12 (1977). In South Dakota v. Opperman, 428 U.S. 364, 367 (1976) the Court observed that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."

Petitioner inaccurately asserts "inherent mobility" is the only justification for the automobile exception. This contention ignores the line of cases approving warrantless searches of disabled cars or cars in police custody "in which the possibility of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). As explained in United States v. Chadwick, supra, "The answer lies in the diminished expectation of

privacy which surrounds the automobile."

In disregarding any expectations of privacy in the living compartment of a motor home, Petitioner suggests not a "vehicle exception" to the warrant requirement, but an "inherent mobility" exception. Many items may be characterized as "inherently mobile" such as suitcases, letters, even people. Yet one could scarcely expect the Court to authorize warrantless searches of any item merely because it is potentially mobile.

Unlike the search of an ordinary automobile which "seldom serves as one's residence or as the repository of personal effects," Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) and where expectations of privacy are "diminished by the obviously public nature of automobile travel," South Dakota v. Opperman, supra, warrantless entry and search of the living compartment of a legally parked, driverless motor home under police control stretches

the reason for an automobile exception too far. Lower courts have correctly determined the privacy interest in a dwelling space requires greater exigency to justify warrantless entry than the mere speculated "possible" emergency represented by "inherent mobility." ^{2/}

Real rather than theoretical justification must exist for warrantless intrusion into a dwelling space.

Even assuming an "automobile exception" could be applied to the warrantless search of a motor home, probable cause to search is required. Here the requisite probable cause is not established in the record. Officer

^{2/} As the California Supreme Court noted, no claim of genuine exigency can be made on the record in this case. Respondent had been arrested outside the motor home which was parked for an unknown period of time in a privately owned parking lot on a weekday afternoon within a few hundred yards of a courthouse where many magistrates were available to issue the requisite warrant. Under these circumstances, securing the motor home while a warrant was obtained would be no more difficult than securing any other residence in order to obtain a magistrate's permission to search.

Clem who made the physical entry into the living compartment never claimed he entered believing he would find contraband and never claimed in the record he had probable cause to search for marijuana. His sole articulated justification for entering the motor home was to look for "additional suspects," a justification the California Supreme Court found to be unsupported by a factual basis. Clem never testified to any facts he knew justifying a belief there might be other "suspects" inside the living area. Petitioner does not seek review of the California Supreme Court decision that the warrantless entry by Clem was not justified as a search for additional suspects.

While Officer Williams claimed anonymous information which may have helped establish probable cause to search, there is no indication in the record the anonymous tip was communicated to Officer Clem who actually made the decision to search.

The record does not disclose whether or not Officer Clem heard the questioning of the young man. In fact, the record is devoid of evidence indicating what Officer Clem knew prior to his entry. This record does not show Officer Clem had any facts sufficient to establish probable cause for the entry.

Petitioner predicts grave difficulties in applying the California Supreme Court's rule. Whether the analysis of the Ninth Circuit and the California Court in balancing the privacy interests in living quarters against the need for effective law enforcement ultimately will prove unworkable can only be demonstrated in time through experience. Further consideration of the ramifications of the question by lower courts will enable this Court to deal with the issue more carefully if it becomes necessary. Apparently no courts other than the California Supreme Court and the Ninth Circuit have even considered the issue. As in

McCray v. New York, ____ U.S. ____, 103 S. Ct. 2438, 2439 (1983) (Stevens, J., on cert. denial) "(I)t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." Hasty decision of the question is not needed.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS F. HOMANN
Attorney for Respondent
Charles R. Carney

DATED: January, 1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

JUN 4 1984

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

JOINT APPENDIX

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JOINT APPENDIX

Chronological List of Dates on Pleadings Filed; Hearings Held, and Orders Entered	JA	1	-	3
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CHRONOLOGICAL LIST OF DATES
ON PLEADINGS FILED; HEARINGS
HELD, AND ORDERS ENTERED
(Superior Court Docket
Sheets not in record)

SUPERIOR COURT OF THE STATE OF
CALIFORNIA IN AND FOR THE COUNTY
OF SAN DIEGO

People v. Charles Richard Carney,
No. Cr 47927

DATE	PROCEEDINGS
9/14/79	Information filed.
9/19/79	Carney pleads not guilty.
10/5/79	Carney files motion to suppress evidence.
10/19/79	Parties stipulate to preliminary hearing transcript being considered by court. Motion to suppress denied.
11/5/79	Carney changes plea to nolo contendere.

JA-2

1/14/80

Order granting probation entered.

1/22/80

Notice of appeal from denial of suppression motion filed.

COURT OF APPEAL FOR THE STATE
OF CALIFORNIA,

FOURTH APPELLATE DISTRICT,
DIVISION ONE

People v. Charles Richard Carney

4 Crim. 11637

(Superior Court No. 47927)

Date

Proceeding

3/18/81

Judgment affirmed.

SUPREME COURT OF THE STATE
OF CALIFORNIA

People v. Charles Richard Carney

Crim. 22047

(Superior Court No. Cr 47927)

Date

Proceedings

6/10/81

Hearing granted.

9/8/83

Order of probation
reversed and case
remanded to allow
Carney to withdraw
his plea.

[Clerk's Transcript p. 1]

Filed in Superior Court of the State of
California, in and for the County of San
Diego, this 14th day of September 1979

ROBERT D. ZUMWALT, COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff
vs.
CHARLES RICHARD CARNEY
Defendant

D.A. No. A37492

Case No. CR# 47927

INFORMATION

The District Attorney of the County of San Diego, State of California accuses the Defendant(s) of committing, in the County of San Diego, State of California,

before the filing of this Information,
the following crime(s):

COUNT ONE: On or about May 31,
1979, CHARLES RICHARD CARNEY did
unlawfully possess marijuana for sale, in
violation of Health and Safety Code sec-
tion 11359.

DATED: September 14, 1979

EDWIN L. MILLER, JR.
District Attorney
COUNTY OF SAN DIEGO
STATE OF CALIFORNIA

By: William H. Kennedy
Assistant District
Attorney

[Clerk's Transcript p. 41]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

DATE: October 19, 1979

MINUTES DEPT: TWENTY-SEVEN

PRESENT: HON. WILLIAM T. LOW

CLERK: EUGENE M. HORA

REPORTER:

BAILIFF:

CR-47927-

DA A37492

People of the State of California vs.

CHARLES RICHARD CARNEY

James E. Hamilton, Esq.

Deputy Dist. Attorney

George Haverstick, Esq.

MINUTE ORDER

By direction of the Court.

The Court finds as follows:

1. Officer Williams had probable cause to arrest for felony sex and

narcotic offenses and a reasonable belief that the Dodge motorhome contained contraband based on the anonymous phone calls, information from WETIP and the juvenile's statement. The officer's observations corroborated the information.

2. A search of the motorhome was authorized. Where there is probable cause to search the vehicle there is no requirement of withholding an immediate search and holding the car until a magistrate issues a search warrant.

Chambers v. Maroney, 399 U.S, 42; People v. Hill 12 Cal.3d 731; People v. Dumas, 9 Cal.3d 871.

3. Since the crimes were committed in the motorhome itself, the vehicle could be seized as evidence of the crime. North v. Superior Court,

/

8 Cal.3d 301, 305; People v. Rodgers, 21
Cal.3d 542, 549.

4. The defendant's motions
based on Penal Code 1538.5 and 995 are
denied.

emh

RELEVANT MATERIAL FROM REPORTER'S
TRANSCRIPT

[Reporter's Transcript pp. 6-8]

Excerpts from Deputy District Attorney's
Direct Examination of Arresting Officer

[Deputy District Attorney Dubow's
Direct Examination of Agent Williams]

Q Now, Agent Williams, you indicated that you saw Mr. Carney on the 31st of May, 1979. Were you looking for him?

A No, Sir, I didn't have any idea who he was at that time.

Q What brought your attention to him?

A He did not look like he fit in the area there, and he was approaching a Mexican boy and talking to him.

Q So what did you do?

A Well, I didn't do

anything. I kind of kept an eye on him while he just happened to be in the same area of the other surveillance.

Q What did you do after you finished watching him, Mr. Carney?

A Well, when I first observed Mr. Carney I believe he was right at 4th Street, and the next time I observed him I had walked down a block and he was -- he had moved down in front of the restaurant. I think that's at 3rd Street and Broadway, or a block behind the little park there. He was standing on the corner, and he was kind of looking at me and talking to the boy at the same time. I was watching somebody who had walked south on 3rd Street, so I was standing right next to him.

Q Did you see where Mr. Carney and this boy went?

A Well, I went down the

street following the people, the original people, along with Agent Peralta.

MR. HAVERSTICK: I object, nonresponsive.

THE COURT: Yes, sustained.

BY MR. DUBOW

Q Where did you see the defendant go with this boy?

A I didn't see where they went at that time. I walked away from them at that immediate time.

Q Did you see him again?

A Yes.

Q When was that?

A Approximately five minutes later, I am guessing.

Q Where did you see him again?

A I saw him walking in the area of -- I believe it was -- Let's see, 4th and "G," near the parking lot which

we had walked up toward. We saw him coming down that area of the street.

Q Did you see where they went?

A Yes. We watched them go into a parking lot, and they walked over to a Dodge mini motor home and they both got into it.

Then we walked over and got the license plate and saw that it was on information that we had received from WETIP stating that this man had taken the place of the person we were following and dealing narcotics.

[Reporter's Transcript p. 10]

Q Did you notice anything unusual occur inside the camper?

A Yes, I saw the man in the brown leather jacket, later identified as Carney, going up and closing the -- well,

in a mini motor home you have curtains that come around across the front windshield. I saw him closing those. And all the other -- the majority of the rest of them had already been closed or were closed after that.

[Reporter's Transcript p. 15]

Q Approximately how long after you had observed the drapes or the curtains to be drawn was it before you saw either the boy or the man again?

A Approximately an hour and 15 minutes.

[Reporter's Transcript p. 17]

Q A boy came out; is that correct?

A Yes, Sir.

[Reporter's Transcript p. 18]

Q Then what happened?

A Then I waited until he stepped -- he walked a little easterly over to the street there, which is, I guess, 3rd Street. And then he walked north on 3rd and I came up behind him and I stopped him and identified myself along with Agent Clem, and, I think, Agent Peralta at that time.

Q What did you do after identifying yourself?

A We asked him what he had been doing in the motor home. We told him we were on a narcotics investigation.

[Reporter's Transcript p. 22]

Q Officer, what did this boy tell you that occurred 'n that van?

A Well, he stated that he had been -- the man -- the older man had asked him to have sex with him and had

given him a small bag of marijuana. And then he had allowed this older man to perform oral sex on him.

[Reporter's Transcript pp. 23-24]

Q Based on what he told you and the WETIP letter and the anonymous phone calls and your observations, what did you do?

A We had the young boy go back and knock on the door and ask him to step outside.

Q Did the young boy do this?

A Yes, he did.

Q What happened when he knocked on the door?

A Well, Mr. Carney opened the door, and, of course, he had to step down a step anyway, so he was just a step from stepping outside to open the door.

/

And we identified ourselves as police and federal officers, and he stepped down.

At that time Agent Clem stepped one step up and looked inside to see if anybody else was in there.

He stepped back out and he said, "There is marijuana and all kinds of paraphernalia laying on the table right inside the doorway."

[Reporter's Transcript p. 35]

Q Now, I show you People's 3 marked for identification. Do you recognize what People's 3 depicts?

A Yes, sir. I cannot tell exactly what everything is from the picture. I would have to refresh to see what type of bags they were. This is the first -- the first one on the left side is the passenger side cupboard over

this table that the other picture was of.
This is over it.

The right-hand picture is the cabover, which is above the driver and the passenger. It is the bunk that sits over the cab.

Q All right. What is the bottom picture?

A That is the picture of the refrigerator and the exhibits that were found in there.

Q Do those photographs accurately depict your observations?

A Well, yes, they are not -- you know you can't tell exactly how much of everything is there from the pictures, but, yes, what we saw when we opened them up and as we were taking -- pulling stuff out.

/

/

[Reporter's Transcript pp. 62-64]

Excerpts from Defense Counsel's Cross-
Examination of Arresting Officer.

[Attorney Haverstick's Cross-
Examination of Agent Williams]

Q And did the young man then
do what you had told him to do?

A Yes, sir.

Q And what did he do?

A He knocked on the door.

Q And that is what you had
told him to do for you, isn't it?

A We had asked him if he was
willing to be a witness and if he would
do that, yes.

Q Who had come up with the
idea of his knocking on the door? Did
you or did he?

A I did.

Q Did someone answer the
door?

A Yes, sir.

Q Would you explain what happened? Did someone come to the door, or exactly what did you see next?

A The door came open. Mr. Carney stepped down to one step before the ground there, and we identified ourselves to him.

Q At that point when you say, "one step before the ground," was he on the inside of the door at that point?

A His feet were, yes.

Q Did he then step outside?

A Yes, sir.

Q And prior to his stepping outside did you tell him to do something?

A Possibly, yes, very possibly, we asked him to step out. I don't remember for sure that we asked him to step out, but -- whether he stepped

/

voluntarily or we asked him, I don't remember.

Q Did you then ask him to face you?

A I don't remember that per se, no.

Q Well, what was Mr. Carney's position at the time that Agent Clem stepped into the vehicle?

A I believe as Mr. Carney stepped out, Agent Clem stepped up on the steps, looked in, and stepped back out and told me what was observed, to the best of my knowledge.

Q And the first step is inside the van, is it not?

A Yes, sir. Well

Q In other words, there is an exterior door on the van, is there not?

/

A Yes, it is probably an exterior step that would be outside the van. Whether it was down or not, I don't know. From what I remember, Agent Clem stepped in where the door would have locked, stepped on that step and looked in.

Q So he had his body and feet inside the van at that time when he looked, did he not?

A I believe so. You would have to ask Agent Clem.

Excerpts from Deputy District Attorney's
Direct Examination of Officer.

[Deputy District Attorney
Dubow's Direct Examination of Agent Clem]

[Reporter's Transcript p. 72]

Q What did you do when the defendant answered the door?

/

A The first thing, I identified myself as a police officer. The defendant then stepped down out of the motor home at about the same time I stepped in the motor home to check to see if there were any other occupants of the vehicle.

Q Now, why did you do that?

A Safety reasons, to see if anybody else was in there.

NOTE REGARDING THE JUDGMENT OF THE
CALIFORNIA SUPREME COURT

The opinion and judgment of the California Supreme Court in People v. Charles R. Carney, Crim. No. 22047 (Superior Ct. No. CR 47927) is contained in the Appendix to the Petition for Writ of Certiorari at pages A-1 through A-52.

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: 83-859
October Term, 1983

JOHN K. VAN DE KAMP
Attorney General of
the State of California
LOUIS R. HANOIAN
Deputy Attorney General

PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

110 West A Street, Suite 700
San Diego, California 92101

CHARLES R. CARNEY,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within JOINT APPENDIX as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 3 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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FOR DELIVERY TO:

Hon. William T. Low, Judge.

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California on the 1 day of June 1984.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, June 1, 1984.

Subscribed and sworn to before me
this 1st day of June 1984.

Vida M. Allen

Notary Public in and for said County and State

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.



VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO

My commission expires Aug. 20, 1987

NO. 83-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

BRIEF ON THE MERITS

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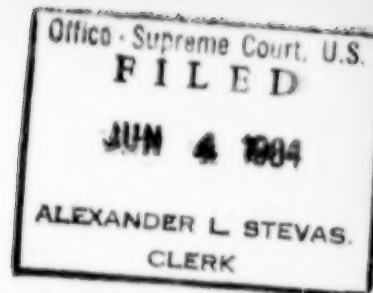
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PETITION FOR CERTIORARI FILED NOVEMBER 25, 1983
CERTIORARI GRANTED MARCH 19, 1984

BEST AVAILABLE COPY



QUESTIONS PRESENTED

1. Do the Fourth and Fourteenth Amendments to the United States Constitution permit law enforcement officers to conduct a search of a fully mobile "motor home" without a search warrant, pursuant to the vehicle exception to the warrant requirement created by this Court in Carroll v. United States (1925) 267 U.S. 132, 149, when the officers have probable cause to believe the motor home contains that which is lawfully subject to seizure?

2. Is the underlying basis for the vehicle exception inherent mobility, as this Court announced in Carroll, or did the California Supreme Court correctly interpret the United States Constitution when it repudiated the Carroll reasoning and announced the underlying

ii.

basis for the vehicle exception as reduced expectation of privacy?

3. If a motor home is entitled to different treatment from other vehicles, how does one distinguish between a motor home and any other vehicle for purposes of the vehicle exception?

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CASES	<u>Pages</u>
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CASES	<u>Pages</u>
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NO. 83-859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the California Supreme Court reversing the order of probation is reported in People v. Carney (1983) 34 Cal.3d 597 [194 Cal.Rptr. 500; 668 P.2d 807], and is included as Appendix A to the petition for writ of certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on September 8, 1983. (Appen. A to Petn. for Cert.) A timely petition for rehearing was denied on October 6, 1983. (Appen. B to Petn. for Cert.) The petition for writ of certiorari was docketed November 25, 1983, within 60 days after the petition for rehearing was denied. The petition for writ of certiorari was granted March 19, 1984. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
Amendments Four and Fourteen.

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STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County on September 14, 1979, respondent, Charles Richard Carney, was charged with a single count of possession of marijuana for sale. (JA 4-5; CT 1.)^{1/}

Respondent's motion to suppress evidence taken from the search of his motor home was submitted on the transcript of the preliminary hearing and

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1. The designation "JA" refers to the Joint Appendix. The designation "CT" refers to the Clerk's Transcript on appeal. The designation "RT" refers to the Reporter's Transcript on appeal.

subsequently denied on October 19, 1979.
(JA 6-8; CT 41.)

On November 5, 1979, respondent withdrew his not guilty plea and entered a plea of nolo contendere to the charge. On January 8, 1980, respondent was granted probation for a period of three years. (CT 34-36, 44.)

Respondent's conviction was affirmed by the California Court of Appeal on March 18, 1981. On September 8, 1983, the California Supreme Court reversed respondent's grant of probation.

A. Facts Relating to the
Offense²⁷

While investigating activities

2. The facts are taken from the Reporter's Transcript of the preliminary examination held on September 5, 1979. This testimony served as the sole evidentiary basis for the trial court's decision to deny respondent's motion to suppress evidence.

in downtown San Diego on May 31, 1979, Drug Enforcement Administration (DEA) Agent Robert Williams observed respondent, Charles Carney, approach a young Mexican boy. Agent Williams watched as respondent and the boy got into a Dodge Mini Motor Home which was parked in a lot at 4th and G Streets. (JA 9-12; RT 4-8, 10.)

Agent Williams noted the license number of the motor home and recalled he had, on numerous occasions, received information that this vehicle was involved in drug activity. The information was received by letter and telephone contacts from an organization known as "WETIP" (We Turn In Pushers). Agent Williams knew the motor

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home belonged to Lee Bowman. Williams also knew an unidentified man had taken Bowman's place in dealing narcotics, and exchanging marijuana for sex with young boys, from the motor home. Williams estimated the age of the boy respondent escorted into the motor home to be 15 or 16, maybe 17. (JA 12; RT 8-10, 14-15, 51, 55.)

The boy emerged from the motor home approximately an hour and a quarter after entry. Williams, along with Agents Clem and Peralta, followed the boy, made contact with him and informed the boy they were agents conducting a narcotics investigation. In response to Williams' questions, the boy stated the "older man" asked him to have sex with him. He allowed the older man to orally copulate him in exchange for a small bag of marijuana. JA 12-15; (RT 15-22.)

Williams took the boy back to the motor home and had the boy knock on the door. When respondent opened the door and stepped out of the motor home, Williams, Clem and Peralta identified themselves as agents. Agent Clem stepped up one step and looked inside the motor home to see if there were any other occupants in the vehicle. Clem observed, in plain view on a table inside the motor home, a large bag of marijuana, a small bag of marijuana, some Ziploc bags and a scale. When Clem informed Williams of his observations, Williams placed respondent under arrest. Photographs of the interior of the motor home were taken by Agent Williams. The vehicle was then driven to the National City office of the Narcotics Task Force for an inventory. During the inventory search marijuana

was found inside the cupboard above the table and inside the refrigerator. (JA 15-22; RT 23-27, 29, 34-35, 40-49, 72-73.)

B. Judgment of the California Supreme Court

On September 8, 1983, the California Supreme Court reversed the order granting probation, holding that a motor home is fully protected by the United States Constitution's Fourth Amendment guarantee against unreasonable search and seizure and is not subject to the "automobile exception" to the warrant requirement. (People v. Carney, supra, 34 Cal.3d 597, 610 [194 Cal.Rptr. 500, 668 P.2d 807]; appen. A to Petn. for Cert., p. 30.) Underlying the California Supreme Court's decision is the premise that inherent mobility has been supplanted by reduced expectation of privacy as the primary reason for the

"automobile exception." (People v. Carney, supra, 34 Cal.3d at pp. 604-605 [194 Cal.Rptr. 500, 668 P.2d 807]; appen. A to Petn. for Cert., pp. 11-17.)

SUMMARY OF ARGUMENT

The history of the vehicle exception demonstrates that, since its inception, mobility has served to independently justify a warrantless search of a vehicle. When the exception was first recognized by this Court in Carroll v. United States (1925) 267 U.S. 132, mobility was the sole justification for the exception. It is the inherent ability of a vehicle to move which distinguishes the search of a vehicle from the search of a building.

Inherent mobility has remained an independent justification for the vehicle exception despite recognition of additional justifications based upon diminished expectations of privacy, pervasive regulatory schemes and administrative burdens. These additional justifications do not detract from the

inherent mobility of the vehicle nor do they detract from mobility as an independent justification for the exception.

In United States v. Ross (1982) 456 U.S. 798, the Court's examination of the Carroll decision reinforced inherent mobility as an independently sufficient justification for the vehicle exception. The inherent mobility associated with a vehicle justifies the application of the vehicle exception even when the object of the search is a "motor home" capable of supporting a residential use.

This Court has recognized the critical necessity for providing law enforcement officers with "bright line" guidance in search and seizure situations. "Bright lines" are necessary so officers can apply the underlying constitutional abstractions confidently and consistently in the practical

pursuit of their daily business.

Mobility presents a bright line approach to vehicle searches. This bright line guidance is in contrast to the California Supreme Court's rule which is incapable of definition or rational application because it is based on the subjective analysis of vehicle configuration and potential current use. Such a rule is unworkable when one considers law enforcement will come in contact daily with every imaginable vehicle in countless situations.

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ARGUMENT

I

THE HISTORY OF THE
VEHICLE EXCEPTION
DEMONSTRATES THAT,
SINCE ITS INCEPTION,
MOBILITY HAS SERVED
TO INDEPENDENTLY
JUSTIFY A WARRANTLESS
SEARCH OF A VEHICLE

A. Introduction

In this case the court must examine the analytical underpinnings of the vehicle exception to the Fourth Amendment's general search warrant requirement. This examination is required because of the California Supreme Court's rejection of mobility (and therefore inherent exigency) as the basis, supplanting it with a subjective and elusive "reduced expectation of privacy" basis. As shall be demonstrated, the practical difference is both enormous and critical.

The Fourth Amendment's guarantee against unreasonable searches and seizures has been interpreted to require that searches of private property normally be performed pursuant to a search warrant. (Arkansas v. Sanders, (1979) 442 U.S. 753, 758, disapproved in part on other grounds in United States v. Ross, supra, 456 U.S. at p. 824.) Thus, warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. (Mincey v. Arizona (1978) 437 U.S. 385, 390.)

This case concerns one of these exceptions, recognized at least since Carroll v. United States, supra, 267 U.S. at p. 149, which arises when an automobile or other vehicle is stopped and the police have probable cause to believe it

contains evidence of a crime. (Colorado v. Bannister (1980) 449 U.S. 1, 3.)^{3/}

Though petitioner will quarrel with the title, this exception has come to be known as the "automobile exception."

(See, Arkansas v. Sanders, supra, 442 U.S. at p. 757.)^{4/}

3. Other exceptions to the warrant requirement include: search incident to arrest, Chimel v. California (1969) 395 U.S. 752; consent, Schneckloth v. Bustamonte (1973) 412 U.S. 218; plain view, Harris v. United States (1968) 390 U.S. 234; hot pursuit Warden v. Hayden (1967) 387 U.S. 294; stop and frisk, Terry v. Ohio (1968) 392 U.S. 1; emergency, Michigan v. Tyler (1978) 436 U.S. 499; and prevention of loss or destruction of evidence, Schmerber v. California (1966) 384 U.S. 757.

4. The term "automobile exception" is a misnomer. Use of the term "automobile exception" has served to create confusion in the courts and in the minds of officers in determining when a warrant is required in search cases. The "automobile exception" applies to vehicles and vessels of all types and configurations and thus, is more properly referred to as a "vehicle exception."

The exceptions to the warrant requirement have been established where

(Footnote 4 cont.)

(See State v. Bouchles (Me. 1983) 457 A.2d 798, 799-800, search of a van; United States v. Mesa (5th Cir. 1981) 660 F.2d 1070, 1073, 1078, search of sailing vessel, a van, and two campers; State v. Million (Ariz. 1978) 583 P.2d 897, 902-903 [120 Ariz. 10], search of a motor home; United States v. Worthington (5th Cir. 1977) 544 F.2d 1275, 1280, search of an airplane; United States v. Lovenquith (9th Cir. 1975) 514 F.2d 96, 99, search of a camper; and, United States v. Bozada (8th Cir. 1973) 473 F.2d 389, 391, search of a tractor-trailer.

The California Supreme Court's mistaken interpretation of the Carroll rule as creating an "automobile exception" instead of a vehicle exception appears to be the basis for its holding in the Carney case. The majority goes to great lengths in an attempt to distinguish between an automobile, which would be covered by an "automobile exception," and a motor home, which the court calls a "hybrid" between an automobile and a house which the California court argues, would not come under an "automobile exception." (People v. Carney, supra, 34 Cal.3d at p. 604-610; [94 Cal.Rptr. 500, 668 P.2d 807] appen. A to Pet. for Cert. pp. 9-31.) Had the California Supreme Court correctly characterized the Carroll rule as creating a vehicle exception, it would have been forced to

it was concluded the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search. (Arkansas v. Sanders, supra, 442 U.S. at p. 759.) These exceptions have been carefully drawn and generally are characterized by clear and coherent guidelines, or "bright lines," which are critical to the consistent and efficient application of these constitutional abstractions by the nation's constables.

The vehicle exception was established due to the unique ability of a vehicle to move from one place to another. Thus, the ability to move creates an exigent circumstance which

(Footnote 4 cont.)

affirm the Carney case. The motor home involved in this case is a vehicle, as capable of movement as any automobile or other vehicle.

serves to excuse the warrant requirement where there is probable cause to believe a vehicle contains seizable materials.

(Carroll v. United States, supra, 267 U.S. at pp. 149-156.)

B. Mobility Served as the Sole Justification for the Vehicle Exception When it was First Recognized by this Court in Carroll v. United States.

Any examination of the vehicle exception must necessarily begin with an examination of Carroll v. United States, supra, 267 U.S. 132. The Carroll Court engaged in an extensive analysis of the history of warrantless searches for contraband concealed in vessels and vehicles. (Id., at pp. 150-153.) The Court concluded:

"We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and

seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. . . ." (Carroll v. United States, supra, 267 U.S. at p. 153, emphasis added.)

The Carroll Court reasoned this history justified a clearly defined vehicle exception to the Fourth Amendment's warrant requirement.

"On reason and authority the true rule is that if the

search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." (Carroll v. United States, supra, 267 U.S. at p. 149, emphasis added.)

Carroll did not distinguish between vehicles because of their configuration or present or potential uses. Rather, the exigency due to the vehicle's ability to move justified the exception. (See, United States v. Ross (1982) 456 U.S. 798, 806-807.)

Between 1925 and 1970, when the Court came down with the watershed decision of Chambers v. Maroney (1970)

399 U.S. 42, the Court had few opportunities to apply the vehicle exception.^{5/}

A unanimous Court applied Carroll to hold that passage of the car from the street to the garage did not affect the right to search the vehicle. (Scher v. United States (1938) 305 U.S. 251, 254-255.) Though it was not moving, it remained mobile.

The Court approved the search of a vehicle transported to the police station in Chambers v. Maroney, supra,

5. In two of those decisions the Court simply reiterated the fact probable cause was a necessary predicate to justify the warrantless search of a vehicle. (Husty v. United States (1931) 282 U.S. 694, 700; Dyke v. Taylor Implement Co. (1968) 391 U.S. 216, 221-222.) In Dyke, the Court refused to apply the exception to a mobile vehicle because the officers lacked probable cause. Id., at pp. 221-222.) In a third case, this Court rejected the argument a vehicle constituted a place where one had a legitimate privacy right. (Brinegar v. United States (1949) 338 U.S. 160, 176-177.)

399 U.S. 42, by concluding there was probable cause to search at the time the car was seized and the probable cause and inherent mobility of the vehicle still obtained at the police station. (Chambers v. Maroney, supra, 399 U.S. at pp. 50-52.) The inherent mobility of the vehicle caused the Court to characterize the opportunity to search a vehicle as "fleeting." (Ibid.) Furthermore, mobility created a circumstance where, in most cases, the probable cause to search a particular vehicle for a particular article will be unforeseeable. (Id., at pp. 50-51.) Thus, as Chambers pointed out, mobility was the source of numerous problems associated with the search of a vehicle.

An argument was presented to the Court in Chambers that police should be allowed only to immobilize a vehicle

while they sought a warrant. In response, the Court stated:

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." (Chambers v. Maroney, supra, 399 U.S. at pp. 51-52.)⁶⁷

6. For an analysis of the competing interests involved in seizing a vehicle versus searching the vehicle, see, Note, Warrantless Searches and Seizures of Automobiles (1974) 87 Harvard L. Rev. 835, 840-842.

C. Inherent Mobility has
Remained an Independent
Justification for the
Vehicle Exception Despite
the Articulation of
Additional Justifications.

In the years following the Court's decision in Chambers, the vehicle exception was frequently discussed. Consistently appearing in cases involving the vehicle exception is the concept there is a constitutional difference, for purposes of warrantless searches, between structures and vehicles. The reason for the difference is the inherent mobility of the vehicles.^{7/}

7. (See, United States v. Ross, supra, 456 U.S. at pp. 805-807; Robbins v. California (1981) 453 U.S. 420, 424 (plurality), overruled on other grounds in United States v. Ross, supra, at p. 824; Arkansas v. Sanders, supra, 442 U.S. at p. 761, disapproved in part in United States v. Ross, supra, at p. 824; United States v. Chadwick (1977) 433 U.S. 1, 12; South Dakota v. Opperman (1976) 428 U.S. 364, 367; Cardwell v. Lewis (1974) 417 U.S. 587, 589-590 (plurality); Cady v. Dombrowski (1973)

The conclusion that ability to move is the critical inquiry and not actual movement is evident from the fact the Court has continued to apply the vehicle exception to justify warrantless searches of movable vehicles. (Florida v. Meyers (1984) ____ U.S. ____ [44 CCH S.Ct. Bull.P. B2343, B2344-B2345]; Michigan v. Thomas (1982) 458 U.S. 259, 261; Texas v. White (1975) 423 U.S. 67, 68; Chambers v. Maroney, supra, 399 U.S. at p. 52.)

A heightened awareness of privacy rights caused this Court to examine and reject those rights as justifying an end to the vehicle exception. Instead diminished expectations of privacy provided a second justification for the

(Footnote 7 cont.)

413 U.S. 433, 439-440; Coolidge v. New Hampshire (1971) 403 U.S. 443, 459-460 (plurality).)

exception. (See Katz v. United States (1967) 389 U.S. 347; Arkansas v. Sanders, supra, 442 U.S. at p. 761; United States v. Chadwick, supra, 433 U.S. at pp. 12-13; South Dakota v. Opperman, supra, 428 U.S. at pp. 367-369; Cardwell v. Lewis, supra, 417 U.S. at p. 590 (plurality).^{8/} Privacy analysis requires the identification of various factors associated with vehicular travel which serve to reduce privacy in comparison with a structure or residence. Because individual factors are important in such an analysis, the case law has developed a grocery list of such factors. For example, the regulatory scheme

8. In Sanders and Chadwick, the Court's discussion of privacy expectations in vehicle searches was used as a comparison for the privacy expectations one has in a closed container. Both Sanders and Chadwick were container cases, not vehicle cases.

governing vehicle travel lessens one's expectation of privacy.

" . . . Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." (South Dakota v. Opperman, supra, 428 U.S. at p. 368; see, Cady v. Dombrowski, supra, 413 U.S. at p. 442.)

The list of factors published is by no means exhaustive. The articulation of additional factors is limited only by the imaginative capacity of this country's finest legal minds.

Another justification for allowing a warrantless search of a vehicle is premised on the difficulty law

enforcement might have in providing a seized vehicle with secure storage. A vehicle's size, value and inherent mobility make secure storage difficult and make such objects attractive targets for theft and vandalism. A constitutional requirement to seize and hold a vehicle while waiting for a search warrant would place a severe, even impossible, burden on law enforcement. (Arkansas v. Sanders, supra, 442 U.S. at pp. 765-766, fn. 14; United States v. Chadwick, supra, 433 U.S. at p. 13, fn. 7.) Furthermore, given these risks, it can be seen that impound and storage might well be a greater intrusion than immediate search. (See, Chambers v. Maroney, supra, 399 U.S. at pp. 51-52.)

At any rate, it is
apparent these additional justifica-
tions do not detract from the inde-
pendent sufficiency of mobility as a
basis for the vehicle exception.

* * * * *

II

**IN UNITED STATES V. ROSS,
THIS COURT REAFFIRMED
MOBILITY AS AN INDEPENDENT
JUSTIFICATION FOR THE
VEHICLE EXCEPTION**

**A. The Ross Court's Examination of
Carroll Reinforced Inherent
Mobility as an Independently
Sufficient Justification for
the Vehicle Exception.**

Acknowledging an indisputable need for clarification in the law of vehicle searches, the Court traced the origin of the vehicle exception and carefully examined the basis for the exception in United States v. Ross, supra, 456 U.S. 798. In particular, the Court examined the Carroll decision and its historical background. (Id., at pp. 804-809.) The Ross Court found, as the Carroll Court found, it is consistent with the Fourth Amendment's concerns for preserving the public interests as well as the rights of the individual to allow

the warrantless search of a motor vehicle, when the search is undertaken with probable cause to believe the vehicle contains that which is subject to seizure. (Id., at p. 805; Carroll v. United States, supra, 267 U.S. at p. 149.)

Ross makes it clear the vehicle exception announced in Carroll is based upon the inherent and obvious difference between a vehicle and a structure -- the ability to move. (United States v. Ross, supra, 456 U.S. at pp. 805-806.)

The Court concluded:

"Thus, since its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. It is this impracticability, viewed in historical perspective, that provided the basis for the Carroll decision. Given the nature of an automobile in transit, the Court recognized

that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable." (United States v. Ross, supra, 456 U.S. at pp. 806-807; footnotes omitted.)

The exception established by Carroll applies if there is probable cause to search a movable vehicle. (Id., at p. 809.) Realizing the possibility a particular application of the rule may appear to be unfair, the Court stated:

" . . . The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference." (Id., at p. 807, fn. 9.)

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B. The Inherent Mobility
Associated With a Vehicle
Justifies the Application
of the Vehicle Exception
Even When the Vehicle, Like
a Motor Home, is Capable
of Supporting a Residential
Use.

The fact an individual may display some greater expectation of privacy in a particular vehicle or class of vehicles does not overcome mobility as an independent justification for applying the exception. Contrary to the California Supreme Court's view, privacy expectations have not supplanted mobility as the touchstone of vehicle search analysis. (People v. Carney, supra, 34 Cal.3d at p. 605 [194 Cal.Rptr. 500, 668 P.2d 807]; appen. A to Petn. for Cert. p. 14.)^{9/}

9. Following the Court's opinion in Katz v. United States (1967) 389 U.S. 347, there was renewed awareness that the Fourth Amendment protects privacy

The conclusion enhanced privacy expectations do not overcome inherent mobility is evident from both Ross and Carroll. In reaffirming mobility as the basis for the vehicle exception, the Court in Ross observed:

"In light of this established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's

(Footnote 9 cont.)

interests. (See, Ex parte Jackson (1878) 96 U.S. 727, 733, where the Court found an expectation of privacy in an individual's posted letters and packages.) What Katz added to Fourth Amendment analysis is a two step model to test privacy expectations. First, has the individual exhibited an actual or subjective expectation of privacy? Second, is society prepared to recognize as "reasonable" this subjective expectation? (Katz v. United States, supra, at p. 347 (Harlan, J. concurring); Smith v. Maryland (1979) 442 U.S. 735, 740.) As we shall demonstrate, this

prior evaluation of those facts."
(United States v. Ross, supra, 456
U.S. at p. 806, fn. 8.)

Because they are mobile, society is not prepared to recognize as reasonable any subjective expectations of privacy in the contents of a vehicle. Moreover, Ross indicates individuals have always been on notice that such an expectation is unreasonable.

The configuration and present or potential use of the vehicle or vessel may evidence an actual expectation of privacy.^{10/} However,

(Footnote 9 cont.)

expectation is not reasonable on the part of a person who has given officers probable cause to believe his vehicle contains matter subject to seizure.
(United States v. Ross, supra, 456 U.S. at p. 806, fn. 8.)

10. Individuals have exhibited a subjective expectation of privacy in the contents of vehicles over the years. Cars, for example are equipped with locks and trunks to insure privacy.

configuration and present or potential use do not overcome mobility to place a vehicle outside the vehicle exception. In establishing the vehicle exception, Carroll distinguished automobiles, ships, boats and wagons from structures. (Carroll v. United States, supra, 267 U.S. at p. 153.) Sailors live on ships. The pioneers lived out of their wagons.

(Footnote 10 cont.)

Individuals place their most cherished and intimate possessions in a car expecting them to be secret. Writers' carry manuscripts, professors carry tests, judges carry draft opinions, criminals carry weapons, fruits and evidence. Many members of society engaged in their first intimate contact in the confines of a vehicle parked in a secluded place. Other members of society actually live in their automobiles. (See, South Dakota v. Opperman, supra, 428 U.S. 364, 388, fn. 6, (Marshall, J. dissenting); Wilson, The Warrantless Automobile Search: Exception Without Justification (1980) 32 Hastings L.J. 127, 158; Comment, The Automobile Exception: A Contradiction in Fourth Amendment Principles (1980) 17 San Diego L.Rev. 933, 951-952.)

These vehicles and vessels, which Carroll distinguished from structures, historically served as personal residences with the attendant privacy expectations of a residence.^{11/} Even though vehicles may serve the identical residential function as a house, Carroll recognized they are subject to different treatment than structures when there is probable cause to search. The reason for the difference

11. The historical function for these vessels and vehicles contrasts starkly with motor homes like the one that was searched in the instant case. Motor homes and like vehicles are commonly referred to as "recreational vehicles." This term suggests a very different purpose for the vehicle than residence. An individual who goes to the ballpark on a Sunday afternoon would be led to believe a motor home's primary function is to serve as a travelling party.

In this case the record is devoid of any reference to Mr. Carney's use of this vehicle as his personal residence. Thus, his claim is dependant solely on potential use of the vehicle as a residence and speculation.

is due to the inherent ability of the vehicles and vessels to move. (Carroll v. United States, supra, 267 U.S. at p. 153.)

It is therefore apparent the Court in Carroll was not concerned with the configuration of the vehicle or its potential or present use (other than its use to conceal seizable material). Subsequent appellate decisions have applied the reasoning of Carroll to vehicles and vessels which could be used as a residence, and in some cases which served as a residence.^{12/} The doctrine therefore applies to Mr. Carney's motor home for the same reason it was applied to Mr. Ross' automobile: both vehicles were mobile.

12. For application of the vehicle exception to motor homes, see, United States v. Miller (10th Cir. 1972) 460 F.2d 582; State v. Lepley (Minn. 1984)

The policies which supported the original exception still apply to support the vehicle exception's application to Mr. Carney's motor home. Society is entitled to be protected from the danger associated with criminal activity conducted from and in motor vehicles. The danger associated with such criminal activity has magnified during the 60

(Footnote 12 cont.)

343 N.W.2d 41; State v. Mower (Me. 1979) 407 A.2d 729; State v. Million, supra, 583 P.2d 897 [120 Ariz. 10]; State v. Francoeur (Fla.App. 1980) 387 So.2d 1063; State v. Downes (Or.App. 1977) 571 P.2d 914 [31 Or.App. 419]; People v. Uselding (Ill.App. 1976) 350 N.E.2d 283 [39 Ill.App.3d 677]; contra, United States v. Williams (9th Cir. 1980) 630 F.2d 1322; United States v. Wiga (9th Cir. 1981) 662 F.2d 1325; for application of the vehicle exception to ships and boats, see, United States v. Lauchli (7th Cir. 1984) 724 F.2d 1279; United States v. Kaiyo Maru No. 53 (9th Cir. 1983) 699 F.2d 989; United States v. Mesa (5th Cir. 1981) 660 F.2d 1070; United States v. Laughman (4th Cir. 1980) 618 F.2d 1067; United States v. Cadena (5th Cir. 1979) 588 F.2d 100, 102; State v. Roberts (R.I. 1981) 434 A.2d 257.

years since Carroll. The sheer volume of traffic presents a significant hindrance to detection of criminal activity. Vehicles such as motor homes have room to transport vast quantities of drugs, weapons and contraband. Motor homes may even serve as mobile drug laboratories. In addition, the mobility of today's vehicles is far greater than that of the Oldsmobile Roadster in Carroll. Today's vehicles are faster, have better roads to travel, may have off-road capability, and may be fully self-contained. Thus, the exigency which attends inherent mobility exists with greater force in a motor home.

An unreasonable danger would be presented to law enforcement officers if they were required to seize a vehicle and hold it while awaiting a warrant. With ever increasing frequency, police

are being shot and killed in the course of their duties. To seize and hold a vehicle presents an obvious danger to the officer or officers required to perform this function. It also prevents the officers from responding to other situations which require their presence, thereby creating a burden on the public. Moreover, to provide secure storage for the vehicles could be impossible, thereby exposing the public to significant financial liability as well. (See, Arkansas v. Sanders, supra, 442 U.S. at pp. 765-766, fn. 14; United States v. Chadwick, supra, 433 U.S. at p. 13, fn. 7.)^{13/}

While the need for the vehicle exception continued to build over time, the privacy interests involved have

13. As the Court noted in Chambers v. Maroney, supra, 399 U.S. 42, there is no constitutional difference between seizing a vehicle and holding it before

remained constant. Although an individual in a motor home may have a "heightened" expectation of privacy in the contents of his vehicle, his expectation is no higher than the wagoneer's expectation of privacy or the sailor's expectation of privacy in the contents of their vehicles or vessels. The original analysis turned on the inherent mobility of vehicles, and mobility remains to justify application of the vehicle exception to motor homes. Though an individual may believe he is entitled to privacy in the contents of his motor home, he

(Footnote 13 cont.)

presenting the probable cause issue to a magistrate and carrying out an immediate search without a warrant. (*Id.*, at pp. 51-52.) In the case of a motor home, the analysis applies with equal force. The intrusion of seizing and holding a motor home while a warrant is obtained cannot easily be distinguished from the intrusion of allowing a warrantless search based on probable cause.

sacrifices that right when he provides law enforcement officers with probable cause to believe his operable motor home contains seizable material. (United States v. Ross, supra, 456 U.S. at p. 806, fn. 8.)

* * * * *

III

THE CRITICAL BRIGHT LINE
RULE PRESENTED BY AN EXCEPTION
BASED ON INHERENT MOBILITY IS A
STARK CONTRAST TO THE CALIFORNIA
SUPREME COURT'S RULE WHICH IS
INCAPABLE OF DEFINITION OR
RATIONAL APPLICATION BECAUSE
IT IS BASED ON THE SUBJECTIVE
ANALYSIS OF VEHICLE CONFIGURA-
TION AND POTENTIAL USE

Following Ross, analysis of a
vehicle search involves two questions:
first, was there probable cause to search
the vehicle; second, was the vehicle
capable of movement? It is a test law
enforcement officers are capable of
applying in a consistent fashion. The
analysis provides society and the
individual with adequate safeguards.
Under such a test, the officers look at
objective factors which impact mobility
and probable cause, not nebulous factors
such as configuration, present use, or
likelihood it will be moved.

The mobility analysis presented fulfills the need for a "bright line" approach to search cases. The action taken by an officer upon a moment's reflection will be subjected to microscopic analysis by lawyers and judges over a period of years. In this case, the decision to search has undergone five years of review, now including review by the highest tribunal in the land.

" . . . the protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' LaFave, 'Case-By-Case Adjudication' versus 'Standardized Procedures': The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142. This is because

'Fourth Amendment doctrine, given force and effect by the exclusionary rule, is

primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field." Id., at 141.

"In short, '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.'"

Dunaway v. New York, 442 U.S.
200, 213-214." (New York v.
Belton (1981) 453 U.S. 454,
458.)

The Court's decision in Ross was a response to the indisputable necessity for a bright line rule in vehicle search cases. (United States v. Ross, supra, 456 U.S. at pp. 803-804.)^{14/} That Ross served to clarify the law in this area was acknowledged by the concurring

14. The necessity for a bright line approach to vehicle search cases has been repeatedly recognized by this Court. Justice Harlan, in his concurring opinion in Coolidge v. New Hampshire, supra, 403 U.S. at p. 490, referred to the uncertainty then existing as "intolerable." Justice Rehnquist characterized the law relating to searches of vehicles as "something less than a seamless web." (Cady v. Dombrowski, supra, 413 U.S. at p. 440.) More recently, Justice Powell stated that the law of search and seizure with respect to automobiles is intolerably confusing, to the point where the "Court apparently cannot even agree on what it has previously held, let alone on how these cases should be decided." (Robbins v. California, supra, 453 U.S. at p. 430 (Powell, J. concurring).)

justices. (United States v. Ross, supra, 456 U.S. at p. 825 (Blackmun, J. concurring); id., at p. 826 (Powell, J. concurring).)

The ease of application of a rule which centers on probable cause and inherent mobility is evident from the two most recent vehicle search cases ruled on by this Court. In Michigan v. Thomas, supra, 458 U.S. 259, the Court stated:

"We reverse. In Chambers v. Maroney, 399 U.S. 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in Texas v. White, 423 U.S. 67 (1975). See also United States v. Ross, 456 U.S. 798, 807, n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend

upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant. See ibid." (Michigan v. Thomas, supra, 458 U.S. at p. 261.)

The Court's most recent vehicle search case followed Thomas and reversed the state court's suppression ruling.

(Florida v. Meyers, supra, ____ U.S. ____ [44 CCH S.CT. Bull.P. B2343, B2344-B2345].) Both cases relied on the inherent mobility attached to the vehicles. The test applies with equal vigor to a motor home.

The California Supreme Court expressly rejected the bright line mobility test and supplanted it with a test based on an individual's expectation of privacy in a vehicle due to the

configuration and potential residential use of a vehicle. (People v. Carney, supra, 34 Cal.3d at pp. 605-608 [194 Cal.Rptr. 500, 668 P.2d 807]; appen. A to Petn. for Cert., pp. 14-26.) The California Court concluded that the expectations of privacy associated with a "motor home" precluded application of the "automobile exception" to justify the warrantless search of this class of vehicle. (Id., at p. 610; appen. A to Petn. for Cert. p. 30.) In so holding, the California Supreme Court not only ignored this Court's decisions in Carroll and Ross, it also created a test incapable of consistent and rational application.

The California Court justifies its holding by stating that motor homes are "hybrids" with the mobility attributes of automobiles and most of the

privacy characteristics of a house.

(People v. Carney, supra, 34 Cal.3d at p. 606; appen. A to Petn. for Cert. p. 17.)

The characterization of a motor home as a hybrid is of no assistance to law enforcement. This particular hybrid has the characteristics of a chameleon and may cover the entire range of vehicle configurations. In this case, Mr. Carney's motor home was referred to in the record as a "mini motor home," a "camper," a "motor home," and a "van." (JA 12-14, 20-22; RT 8-14.)

The term "motor home" defies objective definition. A subcompact car where the driver keeps a sleeping bag may be "home" just as a Winnebago with interior plumbing and sleeping for six may simply provide transportation. It is wholly impractical to impose on police the burden of assigning a constitutionally

significant value to a person's subjective expectation of privacy according to the shape, make, and present use of a vehicle. The California Supreme Court does not even provide guidance as to what configurations fit this new class of vehicles or what characteristics of those vehicles set them apart from ordinary vehicles. (See, People v. Carney, supra, 34 Cal.3d at p. 614 (Richardson, J. dissenting); appen. A. to Petn. for Cert. pp. 46-48.)

Such a rule should not be given constitutional force. By erasing the bright line of mobility and replacing it with fuzzy concepts of configuration and potential use, the California Supreme Court announces a new search and seizure issue which will require law enforcement to work "at risk" and will both encourage and require years of litigation to fashion into a workable rule.

CONCLUSION

In cases involving the warrantless search of a vehicle, this Court, in Carroll, presented a rule based upon probable cause and inherent mobility. In Ross, the Carroll rule was given new vitality.

On a daily basis law enforcement will come in contact with every imaginable vehicle in infinite situations. The officers will be expected to make reasonable decisions on search and seizure issues based upon objective factors. To ensure these officers are able to perform their functions to protect society and at the same time protect individual rights, bright line rules of general application must be utilized. A vehicle search rule based upon mobility fulfills that requirement.

In the face of this need for a consistent application of the vehicle exception, the California Supreme Court has substituted a rule incapable of definition, and inconsistent in application. The California Supreme Court's rule places constitutional significance on the configuration and potential use of a class of vehicle they decline to define.

The policy factors which served to support the original exception apply with greater force today to support application of the vehicle exception to all vehicles, including Mr. Carney's motor home.

Accordingly, petitioner respectfully requests this Court reverse the decision of the California Supreme

/

/

Court and reaffirm the vehicle exception
established in Carroll and Ross.

Respectfully submitted,

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October Term, 1983

PEOPLE OF THE STATE OF
CALIFORNIA

Petitioner,

v.

110 West A Street, Suite 700
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CHARLES R. CARNEY,

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 3 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

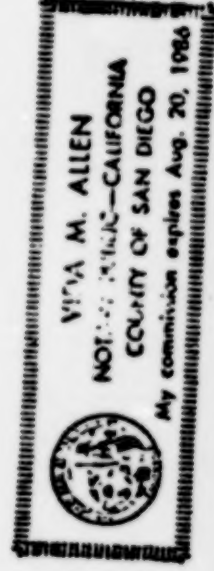
Dated at San Diego, California, June 1, 1984.

Subscribed and sworn to before me
this 1st day of June 1984..

William M. Allen

Notary Public in and for said County and State

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.



(3)
No. 83 - 859

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FILED

JUN 2 1984

ALEXANDER L. STEVENS

CLERK

IN THE

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES R. CARNEY,

Respondent.

ON WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

**BRIEF OF THE STATE OF MINNESOTA AND
THE STATES OF FLORIDA AND HAWAII
AS AMICI CURIAE IN SUPPORT
OF PETITIONER THE PEOPLE OF THE
STATE OF CALIFORNIA**

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IN THE Supreme Court of the United States

No. 83-859

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THE PEOPLE OF
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Respondent.

INTEREST OF AMICI CURIAE

A decision by the United States Supreme Court to adopt the holding of the California Supreme Court in *People v. Carney*, 34 Cal.3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983) that the vehicle exception does not apply to "motor homes" would have an adverse impact on effective law enforcement in the *amici* states. This brief is submitted on behalf of the *amici* states in an effort to protect the *amici* interests in effective law enforcement and to urge this Court to reject the California Supreme Court's ill-founded interpretation of the requirements of the fourth amendment of the United States Constitution as they are applied to warrantless searches of vehicles. The *amicus* State of Minnesota is particularly interested in preserving the viability of its own supreme court's recent decision applying the vehicle exception to a motor home.¹

¹ See *State v. Lepley*, n.9 *infra*.

It is the obligation of the states to protect the general welfare and preserve the safety of their citizens. Through the application of the exclusionary rule, *see Mapp v. Ohio*, 367 U.S. 643 (1961), state law enforcement officers' ability to ferret out crime is directly affected by the decisions of the United States Supreme Court interpreting the meaning of the fourth amendment. Therefore, the *amici* states are compelled to comment on this appeal where a law enforcement officer's right to conduct a warrantless search based on probable cause of a motor home is called into question.

SUMMARY OF ARGUMENT

This brief is submitted in support of the position of the State of California.

The California Supreme Court held in *People v. Carney*, 34 Cal.3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983) that the motor vehicle exception to the warrant requirement does not apply to motor homes. The decision was based on the California court's belief that mobility is no longer the basis for the motor vehicle exception announced by this Court in *Carroll v. United States*, 267 U.S. 132 (1925).

The *amici* contend that mobility is, and should remain, the primary justification for the motor vehicle exception to the warrant requirement. This position is supported by this Court's recent constructions of the *Carroll* doctrine, particularly in *United States v. Ross*, 456 U.S. 798 (1982).

The purpose of the exclusionary rule is to regulate police conduct, and therefore, fourth amendment doctrine must be expressed in rules which can be readily understood and applied by police in the field. The *Carney* court's rejection of the reasonably workable mobility standard in the motor home con-

text will severely hamper effective law enforcement. Further, the *Carney* rule will create a new haven for criminal activity.

For these reasons the California Supreme Court erred in refusing to apply the motor vehicle exception to motor homes, and its decision should be reversed.

ARGUMENT

I. INTRODUCTION.

In *People v. Carney*, 34 Cal.3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983) the California Supreme Court reversed an order of probation for defendant Carney in connection with his plea of *nolo contendere* to the charge of possession of marijuana for sale. The plea had been entered after defendant was unsuccessful in his motions to suppress evidence seized from his motor home. On appeal of the lower court's denial of the suppression motions the *Carney* court examined two proposed justifications for the search of the motor home: the automobile exception and the protective sweep exception. *See Carney*, 34 Cal.3d at 602, 668 P.2d at 808, 194 Cal. Rptr. at 501. Neither of the exceptions proffered by the People was found to apply and regarding the "automobile exception" the court held: "[a]ccordingly, we conclude that a motor home is fully protected by the Fourth Amendment and is not subject to the 'automobile exception.'" *Id.*, 34 Cal.3d at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507. Although the California Supreme Court also rejected the applicability of the protective sweep exception the *amici* will not discuss this issue because the People of California have not raised it before this Court.

The California Supreme Court's decision to refuse to apply the automobile exception to a motor home was grounded on its

belief that the prime justification for the automobile exception was "the diminished expectation of privacy which surrounds the automobile." *Id.*, 34 Cal.3d at 605, 668 P.2d at 811, 194 Cal. Rptr. at 504, (quoting *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). After cataloguing the various domiciliary characteristics present in the motor home the *Carney* court concluded it was more akin to a house than a car and consequently should be treated as such for fourth amendment purposes. The court reasoned, applying the "expectation of privacy" standard, that the fact that the "home" could be driven away was irrelevant on the issue of whether it should be granted the full measure of the fourth amendment's warrant protection. *See id.*, 34 Cal.3d at 609, 668 P.2d at 814, 194 Cal. Rptr. at 507.

It is on the answer to this fundamental question concerning the essential justification for warrantless searches of any mobile vehicle that *amici* disagree with the *Carney* decision. In both its holding and its reasoning the court below diverged from the consistent rulings of this Court that it is the mobility of vehicles which cause them to be accorded different treatment with respect to the warrant requirement. The remainder of the brief will be devoted to elucidating the *amici* position that public and judicial policy dictate that this Court continue to support "mobility" as the primary justification for warrantless searches of vehicles based on probable cause.

II. MOBILITY HAS BEEN, IS, AND SHOULD REMAIN THE PRIMARY JUSTIFICATION FOR THE VEHICLE EXCEPTION TO THE WARRANT REQUIREMENT.

While acknowledging that the underlying rationale for the distinction between vehicles² and houses in *Carroll v. United States*, 267 U.S. 132 (1925), was the inherent mobility of vehicles, the *Carney* court opined that, "mobility is no longer the prime justification for the automobile exception." *Carney*, 34 Cal.3d at 605, 668 P.2d at 811, 194 Cal. Rptr. at 504. The *Carney* court came to this conclusion despite its grudging admission that decisions subsequent to *Carroll* have relied on the mobility justification. *See id.*, 34 Cal.3d at 604, 668 P.2d at 810, 194 Cal. Rptr. at 503. The *amici* submit that this Court's continued reference to mobility as the underpinning of the vehicle exception is not mere lip service as at least one commentator has suggested.³ Instead, the mobility justification remains this Court's animus for the different treatment accorded to the vehicle setting.

² The *Carney* decision, as do most courts and commentators, refers to the doctrine originated in *Carroll v. United States*, 267 U.S. 132 (1925), as the "automobile exception". Obviously, the cardinal objective of this brief is to convince the Court that the *Carroll* doctrine extends beyond automobiles. The *amici* believe that the shorthand "automobile exception" nomenclature is an inaccurate restatement both of the holding of *Carroll* and of the doctrine as it has since developed. Therefore, the *amici* will take Chief Justice Taft at his word when he said the *Carroll* decision applied to, "an automobile or other vehicle," *id.* at 149 (emphasis added), and refer throughout the brief to the doctrine first enunciated in *Carroll* as the "vehicle exception."

³ See Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 Am. Crim. L. Rev. 557, 570 n.72 (1982).

A. The *Carroll* Doctrine Has Always Been Premised On Mobility.

This Court's most recent exhaustive review of the *Carroll* doctrine in *United States v. Ross*, 456 U.S. 798 (1982), explained that the *Carroll* rule is based on a vehicle's quality of mobility;⁴ a characteristic which remains constitutionally significant whether or not the vehicle is in immediate danger of being moved at the time a search is conducted.⁵ The *Ross* opinion can be described as not only a review but also a re-examination and reaffirmation of the *Carroll* Court's constitutional analysis. In particular *Ross* recapitulates *Carroll's* finding that, "historically warrantless searches of vessels, wagons, and carriages—as opposed to fixed premises such as a home or other building—had been considered reasonable by Congress." *Ross*, 456 U.S. at 805. Further, *Ross* explained that *Carroll's* rationale was based on the observation that,

[S]ince its earliest days Congress had recognized the impracticability of securing a warrant in cases involving the transportation of contraband goods. In light of this

⁴ The *Ross* Court quoted from *Carroll's* finding that:

the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, 267 U.S. at 153.

⁵ See *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). "The probable-cause factor still obtained at the station house and so did the mobility of the car. . . ." (Emphasis added).

established history, individuals always had been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

Id. at 806 & n.8.

The line of decisions refusing to apply the mobility justification to "movable" containers in a vehicle,⁶ however, is not inconsistent, as *Carney* seems to suggest, with the proposition that mobility is the primary justification for the vehicle exception. These decisions illustrate, *see generally, Ross supra*, that an owner's expectation of privacy in a movable container's contents should be less protected merely because of the container's presence in the vehicle setting which is distinguished only by its capacity for movement.

As *Ross* has made clear, the *Carroll* exception is "unquestionably one that is 'specifically established and well-delineated.'" *Id.* at 825 (quoting *Carroll*). The *Carroll* exception to the warrant requirement is based on the setting in which

⁶ See e.g., *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

the search takes place.⁷ The distinguishing factor in the vehicular setting is mobility. In order to preserve the "well-delineated" character of the *Carroll* exception it is essential that this Court reiterate that mobility remains the primary justification for treating the vehicle setting differently.

B. Courts Have Continually Applied The *Carroll* Doctrine To Warrantless Searches Of Vehicles Other Than Automobiles.

The *Carney* court's conclusion that mobility is no longer the basis of the vehicle exception not only virtually ignores this Court's decision in *Ross*, but it also cavalierly disregards a host of judicial decisions which applied the exception to

⁷ *Ross* says that it is the setting and not the expectation of privacy which determines the fourth amendment protection afforded.

But the protection afforded by the Amendment varies in different settings. The luggage carried by a traveler entering the country may be searched at random by a customs officer; the luggage may be searched no matter how great the traveler's desire to conceal the contents may be. A container carried at the time of arrest often may be searched without a warrant and even without any specific suspicion concerning its contents. A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause.

In the same manner, an individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband. Certainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container. An individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened. These interests must yield to the authority of a search, however, which—in light of *Carroll*—does not itself require the prior approval of a magistrate.

Ross, 456 U.S. at 823.

vehicles other than automobiles because the vehicle in question was mobile.

In his noted treatise on search and seizure, Professor LaFave states that, "[a]lthough most of the cases concern the search of automobiles, the principles discussed herein are equally applicable to search of trucks; tractor-trailer rigs; trailers attached to cars; camper-type vans; self-contained mobile homes; boats and airplanes." 2 W.LaFave, *Search and Seizure*, 508-09 n.1 (1978) (citations omitted).⁸

While the lower court found motor homes to be alien to the principles announced by this Court in *Carroll* and its progeny, other courts have had no difficulty applying the *Carroll* doctrine to alternative means of transportation. A 1979 state court decision illustrates the vitality of the mobility justification and its application in a non-automobile context. In *State v. Mower*, 407 A.2d 729 (Me. 1979), the Maine Supreme Court applied the vehicle exception to a school bus which had been converted into a camper. The defendant in *Mower* contended on appeal that the bus, which he used as a home, did not fall within the "automobile" exception. *See id.* at 732. The state supreme court rejected the defendant's argument and explained,

[h]is theory overlooks the fact that the automobile exception is based on the distinction between mobile vehicles and fixed structures The converted school bus here

⁸ For an update and additional discussion see 2 W.LaFave, *Search and Seizure*, 1984 Pocket Part at 182, n.2. *See also* Note, *Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule*, 68 Cornell L. Rev. 105-07, n.16. (Despite the author's general criticism of this Court's approach, he concedes "the term 'automobile exception' is misleading because courts have also applied the exception to searches of other vehicles.")

is a mobile vehicle. This one-time school bus differs markedly in its mobility from the wheelless "mobile home" which, like a small house, is capable of being transported from place to place but which has been more or less permanently located.

Id. at 732 & n.5 (citation omitted) (emphasis in original).⁹

Carney completely disregards what seemed so plain to the Maine Supreme Court. In the space of its own opinion the *Carney* court has so lost sight of the importance of mobility to the *Carroll* doctrine that it finds itself bemusedly wondering what 'pervasive reason should necessitate treating persons staying in hotels differently from persons traveling in motor homes' under the fourth amendment. *See Carney*, 34 Cal.3d at 608, 668 P.2d at 813, 194 Cal. Rptr. at 506. Obviously, the elementary distinction between the two situations is that the police can expect the hotel room to be where they left it when they went to seek a warrant, while the motor home and any evidence or contraband it contained could have matriculated to the next county.

III. APPLICATION OF THE VEHICLE EXCEPTION TO ALL MOBILE VEHICLES IS ESSENTIAL TO PROVIDE A WORKABLE GUIDELINE AGAINST WHICH POLICE CONDUCT MAY BE MEASURED AND REGULATED.

As has been argued in the preceding section of this brief, the *amici* believe the *Carney* decision is fundamentally un-

⁹ The *amicus* State of Minnesota recently successfully argued in a pretrial appeal of the suppression of a handgun seized from a motor home that the motor vehicle exception applied to such vehicles. *See State v. Lepley*, 343 N.W.2d 41 (Minn. 1984).

sound in that it misapplies and misunderstands this Court's decisions in *Carroll*, *Chambers* and *Ross*. Yet, an even more serious problem with the *Carney* rule is that it is unworkable in the field and will seriously hamper effective law enforcement.

A. Fourth Amendment Doctrine, Designed As It Is To Regulate Police Conduct, Should Consist Of A Series Of Rules Which Can Be Readily Applied By Police In The Field.

The principal vice of the California Supreme Court's decision to remove motor homes from the ambit of the *Carroll* doctrine is that it adds complexity to the already confusing law of search and seizure. Because the purpose of the exclusionary rule sanction is to regulate police conduct this Court should reduce its analysis, wherever possible, "to simple mechanical rules so that the constable has a fighting chance not to blunder." *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring). As Professor LaFave explains:

[m]y basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

W.LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures:" *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 141 (1974) (footnotes omitted) (quoting *United States v. Robinson*, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting) (*rev'd*, 414 U.S. 218 (1973))).

The *Carney* decision, by rejecting the reasonably workable vehicle exception rule falls into the trap of attempting to achieve an analytical purity that cannot exist in the real world of law enforcement.

[I]f some discipline is not enforced, if some categorization is not done, if the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a fourth amendment with all of the character and consistency of a Rorschach blot.

A. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 375 (1974).

B. The California Court's Fourth Amendment Approach To So-Called "Hybrid" Vehicles Is Not Susceptible To Practical Application By Police And Therefore Will Not Properly Regulate Their Conduct.

The *Carney* decision declares that a police officer who has probable cause to search a vehicle must engage in a two-step analysis before proceeding. First, he must determine whether the vehicle he seeks to search is an "automobile" or some "hybrid." Although the taxonomy of vehicles was self-evident to the *Carney* majority it was not so to the lone dissenter.

First, the majority fails to define its terms. What precisely are "motor homes?" They are almost infinitely variable in size, shape, design, access, and visibility. Some

of the smaller ones are the most enclosed. Others are separately attached as trailers, while still others have direct access from the driver's cab. Is a camper or recreational vehicle a "motor home?" What about a large van or truck? As we explained so recently in *Chavers*, "there is a demonstrable need for clear guidelines by which the police can gauge and regulate their conduct, rather than a complex set of rules dependent upon the particular facts" 33 Cal.3d at p. 469, 189 Cal. Rptr. 169, 658 P.2d 96 [sic]. Although the majority uses the term as if it were readily understood, I find no definition either in statute or dictionary.

Carney, 34 Cal.3d at 614, 668 P.2d at 817, 194 Cal. Rptr. at 510 (Richardson, J. dissenting).

Second, if an officer determines that he is looking at a hybrid vehicle he must next examine the vehicle's outward appearance to determine if it is serving as a permanent or temporary residence. *See id.*, 34 Cal.3d at 609, 668 P.2d at 814, 194 Cal. Rptr. at 507.¹⁰ It is easy to forecast the quandary the *Carney* rule will create for law enforcement personnel attempting to follow its dictates.

The majority quotes with relish the Earl of Chatham's peroration that the King dare not cross the threshold of the ruined tenement, *id.*, 34 Cal.3d at 607, 668 P.2d at 812, 194 Cal. Rptr. at 505, but the *Carney* rule would have no such egalitarianism.

¹⁰ The *Carney* court further complicates the second prong of the analysis for the officer by adding in a footnote, "[o]f course, even if the function of the structure or vehicle is not apparent from its exterior, the protections will come into play at whatever point a reasonable person would realize that the place being searched is serving as a home (e.g., from its furnishings or other residential accoutrements)." 34 Cal.3d at 609, 668 P.2d at 814, 194 Cal. Rptr. at 507 n.7.

tarian application. Many of the poorest in society are forced to live in automobiles. However, because few of those driven by circumstances into this type of itinerant existence can afford to include the accoutrements of residence, e.g., beds and refrigerators, which *Carney* contends provide an objective indication of residence, they would not benefit from the *Carney* rule. *Id.*, 34 Cal.3d at 606, 668 P.2d at 812, 194 Cal. Rptr. at 505.

The *amici* strongly urge this Court to reject a rule which requires police to make assessments concerning the subjective intent of the owner of a vehicle from its external appearance. Law enforcement personnel can be counted on to determine that a vehicle has wheels and is therefore mobile; but the ability of the police to regulate their conduct becomes increasingly doubtful where the decision to search hinges on darkened versus undarkened windshields, or full beds versus reclining seats.

C. The California Court's Approach Creates Uncertainty That Will Deter Police From Making Legitimate Vehicle Searches And Create A New Haven For Criminal Activity.

The *Carney* ruling will tend to chill effective law enforcement because the police may forego warrantless vehicle searches for fear that any evidence obtained will be excluded on the ground the owner or occupant has a protected privacy interest in the vehicle's interior. Narcotics dealers reading *Carney* would be wise to move their drug labs into motor homes. They could clothe their vehicles in all the trappings of residency, but also use the vehicles' mobility to keep them out of the reach of a search warrant.

Much as the *Carney* court wants to ignore the fact that vehicles are mobile, that characteristic cannot be brushed

aside. The exigent circumstances rule without the vehicle exception is not sufficient to protect society's legitimate law enforcement concerns. See *Carney*, 34 Cal.3d at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507. The majority suggests that under the facts of *Carney* the officer could have strolled over to the courthouse to obtain a warrant, yet Mr. Carney could have just as easily started his vehicle and been twenty miles away when the officer returned.

The majority did not heed Justice Richardson's dissenting admonition.

We are concerned, here, with matters of degree. I fully agree that definitions are difficult and that those who "reside" or "live" in a motorized vehicle have a heightened expectation of privacy, but broad generalizations are not useful. While protecting the citizens from unreasonable police intrusions, we also should recognize the difficulty facing law enforcement in balancing its obligation to protect the general public from criminal depredation.

Id., 34 Cal.3d at 615, 668 P.2d at 818, 194 Cal. Rptr. at 511 (Richardson, J. dissenting).

CONCLUSION

The *amici* urge this Court to recognize the tremendous burden the *Carney* rule would place on law enforcement and the considerable confusion such a rule would inject into the vehicle search area. The *amici* petition this Court to conclude the process of clarifying the vehicle search doctrine begun in *Chambers* and nearly completed in *Ross* by reversing the decision below and firmly grounding the *Carroll* doctrine in the inherent mobility of vehicles.

Respectfully submitted,

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No. 83-859

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In the Supreme Court of the United States
OCTOBER TERM, 1983

STATE OF CALIFORNIA, PETITIONER

v.

CHARLES R. CARNEY

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether police officers violated the Fourth Amendment when they conducted a warrantless search based on probable cause of a "motor home" parked in a public parking lot adjacent to the street.

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INTEREST OF THE UNITED STATES

This case presents an important issue regarding the scope of the Warrant Clause of the Fourth Amendment and the so-called "automobile exception" to the warrant requirement. Although this is a state case, the Court's interpretation of the Fourth Amendment necessarily will have a significant impact on federal law enforcement as well. Federal officers frequently encounter in the course of their duties a wide variety of trucks, vans, and campers designed for or capable of being adapted to at least temporary "residential" use, and also favored as means of transporting illicit drugs or illegal aliens.

It is important that these officers be provided a clear and workable rule to guide them in dealing with such situations. The United States therefore has a substantial interest in the Court's resolution of the constitutional issue presented here.

STATEMENT

On September 14, 1979, respondent was charged in an information filed by the District Attorney of San Diego County, California, with possession of marijuana for sale, in violation of Cal. Health & Safety Code § 11359 (West 1975). After moving unsuccessfully to suppress the evidence at issue here, respondent changed his not guilty plea to nolo contendere, and on January 8, 1980, he was sentenced to three years' probation. The California Court of Appeal affirmed respondent's conviction, but the California Supreme Court reversed (Pet. App. A1-A51).

1. The facts adduced at the preliminary hearing, which formed the evidentiary basis for the motion to suppress (see Pet. 3-4), established that Agent Robert Williams of the Drug Enforcement Administration was conducting surveillance of a suspected drug dealer in downtown San Diego. Agent Williams noticed respondent, who seemed out of place, approach and speak to a Mexican boy. Agent Williams then watched as respondent and the youth walked to a nearby parking lot and entered a Dodge Mini Motor Home parked there. They closed the curtains of the vehicle, including one across the front window (Pet. App. A3; Tr. 4-8, 10).¹

Agent Williams had previously received information that that particular vehicle was involved in

¹ "Tr." refers to the transcript of the preliminary hearing of September 5, 1979.

drug activity, so he watched the motor home² and called additional agents. When the boy emerged about an hour and a quarter later, the officers stopped and questioned him. The boy told them that the occupant of the motor home had given him some marijuana in exchange for being allowed to perform oral sex on him. Pet. App. A3-A4; Tr. 8-10, 14-22.

The youth then returned with the agents to the motor home, where, at the agents' request, he knocked on the door. Respondent opened the door and stepped out. The agents identified themselves, and one of them, Agent Clem, stepped up on one step and looked inside the motor home to see if anyone else was there. Agent Clem then saw in plain view on a table just inside the doorway a bag of marijuana, some other plastic bags, and a scale. Agent Williams then arrested respondent, seized the motor home, and took photographs of its interior. The vehicle subsequently was driven to the Narcotics Task Force office, where an inventory search revealed additional marijuana in a cupboard and in the refrigerator. Pet. App. A4-A5; Tr. 23-35, 72-73.

2. The trial court denied the motion to suppress the evidence found in the vehicle, holding that the agents had probable cause and that the "automobile

² The opinion below refers to the vehicle involved in this case as a "motor home," without attempting to define the meaning of that term and without describing in detail the particular characteristics of the vehicle. As we argue below, there are substantial practical difficulties in attempting to draw a line between various kinds of vehicles on the basis of their degree of "homeness" in order to administer the legal principle on which the decision below rests. We use the term "motor home" without intending to concede that the vehicle respondent was using is properly classified as the functional equivalent of a fixed residence.

exception" therefore authorized a warrantless search. See Pet. App. A5-A6. The conviction was affirmed by the intermediate appellate court (Pet. 4), but the California Supreme Court reversed, holding that the search violated the Fourth Amendment.

The court did not take issue with the trial court's finding that, at the time they first entered the vehicle, the agents had probable cause to arrest respondent and to believe that the vehicle contained evidence of a crime. The court did find, however, that the failure to obtain a search warrant violated the Fourth Amendment. Specifically, the court held that the "so-called 'automobile exception'" to the warrant requirement was not applicable here because of the heightened privacy considerations inherent in a camper or motor home as opposed to an ordinary automobile (Pet. App. A9-A31). The court explained that the "mobility" of a vehicle "is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile'" (*id.* at A14, quoting *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). Because it concluded that a "motor home" was more like a home than an automobile with respect to an individual's reasonable expectation of privacy therein, the court held that, in the absence of some other special reason for dispensing with a warrant, a police officer is not permitted to search on the basis of probable cause without a warrant (Pet. App. A14-A30).³

Justice Richardson dissented (Pet. App. A46-A51). He explained that the majority's broad pronounce-

³ The court also rejected the contention that the initial search by Agent Clem was justifiable as a "protective sweep" (Pet. App. A31-A46).

ments with respect to "motor homes" appeared to cover a wide spectrum of vehicles, some of which involve little, if any, more privacy expectation than an automobile (*id.* at A47-A48). Moreover, classifying a vehicle (such as a van) as either an automobile or a "motor home" depending on the particular circumstances, which would be a necessary task under the majority's decision, would be a difficult task for a police officer (*id.* at A48). Instead, Justice Richardson concluded that the treatment of a "motor home" should depend on whether the facts indicate that the vehicle is currently being used primarily as a residence or not (*id.* at A49-A50). Because the camper here—parked next to the street in a public parking lot—apparently was being used more as a vehicle than as a residence, Justice Richardson concluded that the warrantless search was valid under the "automobile exception."

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Supreme Court's conclusion that a "motor home" is indistinguishable from a permanent residence in a building for purposes of the Warrant Clause rests on two faulty premises. First, the court errs in finding that the mobility of a vehicle, and consequent difficulty in securing it, plays virtually no role in the rationale for the established "automobile exception" and hence is irrelevant to the question whether resort to a warrant is necessary to conduct a probable cause search. Second, the court overlooks important considerations—and differences from permanent residences—in assessing the degree of privacy that an individual can reasonably expect in a motor home. The court's failure to consider these relevant factors results in a limitation on ef-

fective law enforcement that is unjustified by Fourth Amendment policies. Finally, the court's decision fails to identify with any precision what attributes of a vehicle change its character sufficiently to justify a warrant requirement. Thus, the decision fails to provide a clear and readily administrable rule for police officers to follow and threatens to open a Pandora's box of litigation over what types of vehicles or alterations made to vehicles qualify for "motor home" status.

Instead, the court should have recognized: (1) that the basis for the automobile exception is two-fold—both the reduced expectation of privacy in a vehicle and the difficulties engendered by its mobility justify relaxation of the warrant requirement; (2) an individual's expectation of privacy in a vehicle, even one that is capable of being used for residential purposes, cannot be equated with that of a permanent residence because of the public nature of vehicular travel and the regulatory intrusions and inspections to which all vehicles are subjected; and (3) that the competing interests should if possible be balanced by application of clear and readily administrable principles. When a vehicle subject to state motor vehicle registration laws is stopped on a public street or parked in a location inappropriate for residence, it is serving primarily a transportation function even if it can be characterized as a "motor home" and can be used as a residence. It is our submission that, in such circumstances, it should be subject to warrantless search on the basis of probable cause like other vehicles.

ARGUMENT

A "MOTOR HOME" IS SUBJECT TO THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT WHEN THE CIRCUMSTANCES INDICATE THAT IT IS BEING USED PRIMARILY AS A TRANSPORTATION VEHICLE

This case arises at the somewhat murky intersection between two well-settled doctrines of Fourth Amendment law: that, in the absence of consent or exigent circumstances, police officers are forbidden to conduct a search of a dwelling without antecedent judicial approval in the form of a search warrant; and that it is permissible to conduct warrantless probable cause searches of vehicles, vessels, and aircraft. While neither the opinion of the California Supreme Court nor the transcript of the hearing affords a particularly clear picture of the specific characteristics of respondent's "motor home," it is reasonably clear that it possessed some attributes of a residence not customarily possessed by automobiles, while at the same time, unlike an ordinary dwelling, it was fully mobile.

We acknowledge that there is some point at which a motor home, by virtue of its design and visible use—for instance, a large motor home manufactured with kitchen facilities and sleeping accommodations that is located at a campsite and connected to plumbing and electrical attachments—should be afforded the protections of a dwelling even though it remains potentially mobile. Conversely, it seems clear to us that there are many vehicles, such as small vans, that, although capable of being adapted to at least temporary residential use, are designed and customarily used primarily for transportation purposes and should not be differentiated from automobiles for

Fourth Amendment purposes. In between is a substantial array of vehicles that more or less lend themselves to occasional residential, as well as transportation, uses. The task of the Court is to enunciate a standard that gives due regard to the competing interests underlying the relevant Fourth Amendment doctrines while affording a manageable standard to guide law enforcement activities. The California Supreme Court has not struck the correct balance.

A. The Mobility Of A Vehicle Traditionally Has Played A Significant Role In Assessing The Reasonableness Of A Warrantless Probable Cause Search

The "automobile exception" was first recognized by this Court in *Carroll v. United States*, 267 U.S. 132 (1925). In that case, federal agents had evidence that two men frequently transported bootleg liquor in a particular car between Grand Rapids and Detroit, Michigan. When the agents unexpectedly encountered those men driving that car along that route, they stopped the car and searched it, finding 68 bottles of liquor hidden inside the seat backs. This Court held that the warrantless search of the car, as long as it was based upon probable cause, was reasonable under the Fourth Amendment. 267 U.S. at 147-156. The Court found that Congress had drawn "a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles," and that such a distinction was consistent with the Fourth Amendment. *Id.* at 147. In an extensive opinion, the Court traced the historical basis for this distinction to legislation passed contemporaneously with the adoption of the Fourth Amendment. *Id.* at 150-153. These statutes consistently recognized (*id.* at 153):

a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Thus, the initial justification for the establishment of the automobile exception clearly was the impracticability of obtaining a warrant because of the ready mobility of vehicles. See generally *United States v. Ross*, 456 U.S. 798, 804-809 (1982).

In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court reaffirmed the principle of *Carroll* that a warrantless search of a vehicle is permitted because "the opportunity to search is fleeting since a car is readily movable." *Id.* at 51. The Court rejected the suggestion that the vehicle should have been seized on the basis of probable cause, but not searched until a warrant could be obtained, reasoning that, in terms of the practical consequences, there was no constitutional difference between an immediate search without a warrant and the vehicle's immobilization until a warrant could be obtained. *Id.* at 51-52. Thus, as the Court recently explained again in *Ross*, the "impracticability of securing a warrant in cases involving the transportation of contraband goods" traditionally has provided part of the reason for permitting warrantless searches of vehicles. 456 U.S. at 806. "Given the nature of an automobile in transit, the Court [has] recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance." *Id.* at 806-807. The rule permitting a warrantless search is one that applies to the

generality of situations and does not depend on an assessment of the degree of exigency caused by the vehicle's immobility in a particular factual context. See *id.* at 807 n.9; *Colorado v. Bannister*, 449 U.S. 1 (1980).

Subsequent to *Carroll* and *Chambers*, however, the Court also identified a second justification for the automobile exception, namely, the reduced expectation of privacy that an individual has in the contents of an automobile. As the Court explained in *United States v. Chadwick*, 433 U.S. 1, 12 (1977) (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)):

One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

Because of the reduced risk that a police officer's mistaken assessment of probable cause will result in a serious privacy intrusion, there is insufficient need for the prophylactic measure of a warrant in connection with a vehicle search. See also *United States v. Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 5; *Rakas v. Illinois*, 439 U.S. 128, 153-155 (1978) (Powell, J., concurring); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

While the Court in recent years has focused on the reduced expectation of privacy in a vehicle as an important basis for the automobile exception to the warrant requirement, it is clear that the Court has not deviated from the view that the mobility of a vehicle remains a significant factor in assessing the need for

a warrant. To the contrary, the Court has characterized the basis for the automobile exception as a "twofold" rationale. See *South Dakota v. Opperman*, 428 U.S. 364, 367-368 (1976); see also *Arkansas v. Sanders*, 442 U.S. 753, 761 (1979); *United States v. Chadwick*, 433 U.S. at 12-13; *Cady v. Dombrowski*, 413 U.S. at 442. Thus, the California Supreme Court's exclusive focus on the expectation of privacy in a motor home, while ignoring its inherent mobility, significantly diverges from the analysis suggested by this Court's decisions.

B. The Diminished Expectation Of Privacy Inherent In Any Vehicle And The Mobility Of A Motor Home Justify A Warrantless Search Of Such A Vehicle When It Is Being Used For Transportation

The California Supreme Court aptly described (Pet. App. A17) the issue in this case as a "hybrid" in terms of Warrant Clause jurisprudence. A motor home plainly is a vehicle and shares most of the characteristics of an automobile that make a warrantless search of an automobile reasonable under the Fourth Amendment; at the same time it possesses some of the attributes of a permanent residence that traditionally have justified the imposition of a warrant requirement. Whether a warrant is required to search a motor home on the basis of probable cause is a difficult question that explores the limits of the automobile exception. Thus, we do not quarrel with the California Supreme Court's recognition that a motor home should not mechanically be treated the same as an automobile for these purposes simply because it is mobile. But, by the same token, the court erred in concluding that a motor home should automatically be treated the same as a residence simply because it can be used as a living accommodation. In

our view, motor homes are so similar to automobiles and other vehicles in important respects that, in certain well-defined circumstances, it is reasonable to permit them to be searched without a warrant.

It is undeniable that greater privacy interests may be implicated by a search of a camper or motor home than of a conventional automobile. When a vehicle is used in part as a place to live rather than exclusively as a means of transportation, a search is more likely to reveal personal effects that implicate significant privacy interests. And a "motor home" may have features that enable individuals to shield the interior from the view of outsiders more effectively than in a conventional automobile.⁴ Given the importance of the expectation of privacy factor to the rationale underlying the automobile exception, these factors suggest that the doctrine should not uncritically be applied to motor homes simply because they are movable vehicles.

There are important countervailing considerations, however, that strongly indicate that warrantless searches of motor homes should be permitted. First, an individual's expectation of privacy in a vehicle is necessarily limited, regardless of the use to which it is put; if a motor home is more "private" in some sense than a conventional automobile, it nonetheless cannot be equated with a permanent residence. See *Rakas v. Illinois*, 439 U.S. at 154 (Powell, J., con-

⁴ The nature and effectiveness of these features will vary depending upon the type of vehicle. Large motor homes designed for use as a residence for an extended period of time will have built-in features to prevent outsiders from looking in. But almost any vehicle, even one not originally designed for use as a residence at all, can be altered to increase the privacy of the occupants to some degree, for example by installing curtains.

curing). This Court has emphasized repeatedly that all motor vehicles are subject to a wide range of regulatory intrusions and inspections, which necessarily circumscribe the degree of privacy that can be expected. See *United States v. Chadwick*, 433 U.S. at 12-13; *South Dakota v. Opperman*, 428 U.S. at 367-369; *Cady v. Dombrowski*, 413 U.S. at 441-442. In addition, there is a significant possibility that a vehicle can become disabled or involved in an accident on the public highways, necessitating a privacy intrusion by the police. These considerations apply with equal weight to "motor homes" (except where they are affixed to a permanent site) as to conventional automobiles.⁵ Thus, even focusing on the expectation of privacy rationale alone, it is apparent that the California Supreme Court's treatment of motor homes as indistinguishable from ordinary residences is flawed. So long as a motor home is susceptible to routine police contact because of state inspection and traffic laws, one cannot reasonably expect

⁵ Moreover, the physical privacy aspect of some vehicles that would apparently be encompassed as "motor homes" by the court below does not approach that of the home. Vans and pickup trucks with simple caps are not substantially more private in customary use than an ordinary passenger car. Even vehicles that are originally designed with heightened privacy in mind are necessarily less private than houses or apartments. Because vehicles travel and often are parked on the public thoroughfares, there is nothing to prevent inquisitive outsiders from approaching them much more closely than they could a house. Those measures that ordinarily are taken to cover up the windows in a vehicle are not generally sufficient, as a practical matter, to protect fully against intrusion by the curious outsider who actually approaches the vehicle. See, e.g., *United States v. Lovenguth*, 514 F.2d 96, 98 (9th Cir. 1975).

the same degree of privacy in such a vehicle as in a permanent residence or even a motel room.

Second, the mobility aspect of the automobile exception rationale fully applies to motor homes. To the extent it is impracticable to obtain a warrant before searching a vehicle because of its mobility, the decision below will significantly hamper law enforcement officers in their ability to seize contraband and evidence when they have probable cause to believe that it is contained in a vehicle that can be characterized as a "motor home." Presumably, when the police have such probable cause, they will have to either let the vehicle go on its way or attempt to seize and immobilize it pending application for a warrant. Putting the officers to this choice is at odds with the consistent thread of the automobile exception decisions, which recognize that the Constitution does not express a preference for immobilization of a car pending a warrant search over conducting an immediate warrantless search. See *Ross*, 456 U.S. at 821 n.28; *Chambers*, 399 U.S. at 51-52. In addition, it may well be that seizing the vehicle is not a feasible option at all. The Court has recognized that it is not always possible for police to seize and securely hold a vehicle (see *Chadwick*, 433 U.S. at 13 n.7; *Opperman*, 428 U.S. at 379 (Powell, J., concurring)), and this is particularly true of campers, which may be oversized and oddly shaped.

Moreover, in important respects the interests of the suspect himself may be harmed by a rule prohibiting a warrantless search. In cases where the search will not uncover any evidence (which are, after all, those cases for which the protections of the Warrant Clause are most useful), a suspect may be unnecessarily deprived of his property for a substantial period of time while a warrant is sought. Indeed, in the com-

mon situation where the probable cause to believe that contraband will be found in the vehicle also provides the basis for arresting the suspect, a warrant requirement may significantly prolong the period during which the individual will be subject to detention. In these situations, especially where the vehicle does not in fact contain contraband and a search would therefore eliminate the basis for arrest, it would ordinarily be preferable from the suspect's viewpoint that an immediate warrantless search be conducted that will exonerate him and spare him the undesirable consequences of continuing suspicion pending application for a warrant.⁶

It is important not to minimize the problems for law enforcement agencies that will be occasioned by the decision below. The larger capacity and enclosed space of the type of vehicles that the California court has carved out of the automobile search doctrine may make them suitable for use as temporary residences, but it also makes them especially convenient and effective instruments for smuggling contraband or illegal aliens.⁷ The problems created for the police are

⁶ It is not a complete answer to this problem that the suspect can consent to a search of the vehicle if he desires to avoid the delay involved in obtaining a search warrant. Cf. *Arkansas v. Sanders*, 442 U.S. at 764 n.12. A police officer is under no obligation to proceed with an immediate search simply because the suspect has consented to it. Given the possibility that an apparent consent to search will later be determined to have been given involuntarily (see generally *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)), it will often be prudent for an officer to decline to conduct a consent search if he believes he has probable cause and knows that a warrantless search would be held unlawful if the consent is successfully attacked.

⁷ A sampling of the reported cases involving searches of campers confirms that they often are used for hauling large

exacerbated by the broad spectrum of vehicles potentially covered by the court's opinion, which is bound to leave officers uncertain as to their obligations. Because of its focus on the privacy implications of temporary residential use, the California Supreme Court's decision would appear to apply to any vehicle used for living purposes. As Justice Richardson points out in his dissent, the holding therefore goes far beyond large recreational vehicles designed as motor homes and extends to vans and pickup trucks used for sleeping and perhaps even to ordinary trucks. See Pet. App. A46-A47. Under the decision below, the courts could be faced with a new and intractable area of litigation—whether particular measures taken by a vehicle owner (such as putting curtains on the windows or a cap on a pickup truck) make the vehicle sufficiently like a home to require imposition of a warrant requirement.

As a practical matter, moreover, the police are ill-equipped to deal with this type of amorphous, fact-specific legal area that would be clarified only slowly on a case-by-case basis and would always remain to some degree uncertain and unpredictable (see, e.g., *Arkansas v. Sanders*, 442 U.S. at 771-772 (Blackmun, J., dissenting)); rather, they are best able to

loads of drugs, particularly marijuana, or illegal aliens. See, e.g., *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *Sharpe v. United States*, 660 F.2d 967 (4th Cir. 1981), vacated, 457 U.S. 1127 (1982), on remand, 712 F.2d 65 (1983), petition for cert. pending, No. 83-529; *United States v. Almand*, 565 F.2d 927 (5th Cir.), cert. denied, 439 U.S. 824 (1978); *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States v. Lovenguth*, 514 F.2d 96 (9th Cir. 1975); *United States v. Cusanelli*, 472 F.2d 1204 (6th Cir.), cert. denied, 412 U.S. 953 (1973).

perform their duties in an efficient and constitutional manner if there exists a relatively clear and easily administrable set of rules to guide them. See, e.g., *Oliver v. United States*, No. 82-15 (Apr. 17, 1984), slip op. 9-10; *New York v. Belton*, 453 U.S. 454, 458 (1981). The imprecision of the decision below is calculated to induce cautious police officers to be overly restrictive in assessing their authority, perhaps leading them to refrain from conducting a warrantless search of almost any vehicle different from a conventional automobile. This would exclude a substantial percentage of the vehicles on the road from the confines of the automobile exception and, more important, would provide drug smugglers with an easy and inexpensive way to avoid on-the-spot probable cause searches—by using a van or pickup truck or perhaps simply by putting up curtains on a car.

Thus, there are serious problems with the refusal of the court below to extend the "automobile exception" under any circumstances to a vehicle that is usable for residential purposes. It is significant to note in this connection that this Court has never suggested that the exception is limited only to automobiles. In *Carroll*, the Court equated ships, wagons, and automobiles (267 U.S. at 153) in recognizing that it was not appropriate to impose the same warrant requirement on the search of vehicles as on the search of homes. The Court's review of the historical development in this area showed that wagons and ships could be searched without a warrant, even though they were used as temporary residences just as surely as motor homes are. See also *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983). And, since *Carroll*, the Court has continued to recognize that the exception to the warrant requirement for vehicles is not restricted to automobiles. See,

e.g., *Cardwell v. Lewis*, 417 U.S. at 589 (plurality opinion); *Chambers v. Maroney*, 399 U.S. at 48. The fact that a vehicle theoretically may be used as a residence does not alter the basic fact that "its function is transportation." *Cardwell v. Lewis*, 417 U.S. at 590 (plurality opinion).

This is not meant to suggest that the residential function of motor homes must be ignored and that they must be treated precisely like any other vehicle simply because they are mobile. It does suggest, however, that the motor home situation is one that requires an accommodation between society's interest in effective law enforcement, which is reflected in a rule permitting warrantless searches, and protection of the individual's privacy interest, which is reflected in the warrant requirement. This accommodation lies between the two extremes of either never or always permitting a warrantless search of a motor home and can, we believe, be struck in a fashion that is capable of being understood and applied by the police without seriously compromising the relevant interests.

In our view, it is important to draw a distinction between a motor home that is primarily functioning as a vehicle and one that is primarily functioning as a residence. When a motor home is clearly being used as a residence, such as when it is stationed at a campground site or otherwise hooked up to utility connections, the rationale for applying the automobile exception is outweighed by the enhanced privacy expectation inherent in its residential use. By the same token, a "mobile home" that is designed to be affixed to a relatively permanent site and is not subject to state motor vehicle registration laws is not really a "vehicle" and ought not to be subject to warrantless

search even when it is being transported on the highways to a permanent site. However, a motor home that is treated by the state as a vehicle for regulatory purposes and that is come upon by the police when it is being used as a vehicle should be retained within the automobile exception.

When a motor home is being used in a way that its "primary function is transportation" (*United States v. Chadwick*, 433 U.S. at 13), the rationale underlying the exception to the warrant requirement is not defeated by the possibility that the vehicle can also be used as a residence. For example, when such a vehicle is stopped while traveling on a public highway or is found parked in a location inappropriate for residence, it is primarily a vehicle for transportation and should be treated as such under the Fourth Amendment. In such a situation, there are strong societal interests in dispensing with the warrant requirement; at the same time, the individual's privacy interest is limited because "individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts" (*Ross*, 456 U.S. at 806 n.8). This limited privacy interest is adequately protected by the requirement that officers have probable cause before conducting a search. See *id.* at 807 n.9.⁸

⁸ Our approach would thus draw the line between "vehicles" and "residences" not on the basis of the attributes of the vehicle, but on the basis of whether it is at least temporarily affixed to a site or is fully mobile. If this Court concludes that such a standard provides insufficient protection to the privacy interest at stake in this class of cases, it must then adopt an approach that attempts to draw distinctions among different kinds of vehicles. If that approach is taken, we would suggest

Applying these principles to this case, it is our view that the court below erred. The facts do not indicate that the motor home here was being used even temporarily as a fixed residence. Rather, it was parked in a public place adjacent to downtown streets and thus apparently was functioning primarily as a vehicle for transportation. In these circumstances, it was reasonable within the meaning of the Fourth Amendment for the police officers to search it on the basis of probable cause without a warrant.

that the most appropriate place to draw the line is between vehicles built specifically for use as a living accommodation—for example, with features such as built-in beds and kitchen facilities—and other vehicles such as vans and camper trucks that are designed primarily for transportation but are capable of being used or converted to use as a place to live. In addition to the reasons given in the body of this brief, we have misgivings about this approach because, while it is more workable than the California court's broad, unfocused conception of a "motor home," it would still create problems of definition for the officer in the field, given the wide spectrum of vehicles that he may encounter in the course of his duties. See pages 15-17, *supra*. We maintain that the best way to establish a sound, bright-line rule is through the approach outlined in the body of this brief; any attempt to focus on the nature of the vehicle itself, including the approach taken by the court below, rather than our proposal to focus on whether the circumstances indicate that the vehicle is being used primarily as a means of transportation, inevitably will lead to litigation over precisely where the line should be drawn. We note only that, if the Court determines that *some* distinction should be drawn among different types of vehicles, the distinction that best accommodates society's interest in effective law enforcement with individual privacy expectations is one that excludes from the automobile exception a narrow category of vehicles that are specifically designed and built for use as mobile residences. If the Court adopts this approach, it would be appropriate to remand this case for development of the record concerning the nature and characteristics of the vehicle involved here.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

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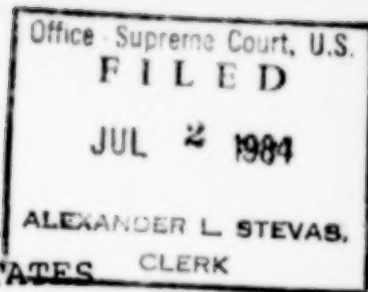
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JUNE 1984



No. 83-859

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CHARLES R. CARNEY,

Respondent,

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF THE CALIFORNIA STATE
PUBLIC DEFENDER AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

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No. 83-859

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA)
)
Petitioner,)
)
vs.)
)
CHARLES R. CARNEY,)
)
Respondents,)
)

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF THE CALIFORNIA STATE PUBLIC
DEFENDER AS AMICUS CURIAE IN SUPPORT
OF RESPONDENT

INTEREST OF AMICUS CURIAE AND CONSENT

The State Public Defender of
California is an agency of the
California state government which is
charged with the representation on appeal
of indigent criminal defendants. The
agency is empowered by statute to appear

". . . as a friend of the court . . .", California Government Code section 15423, and it appeared as amicus curiae in the California Supreme Court. The outcome of the instant case will have a substantial impact upon the rights of persons represented by this office, as well as the public as a whole, to be free of routine warrantless searches of parked motor homes. Accordingly, the State Public Defender of California is filing this brief amicus curiae in support of respondent.

This brief is filed pursuant to rule 36 of the Rules of the Supreme Court of the United States. Consent to the filing of this brief has been given by counsel for petitioner and respondent. A written consent form, signed by counsel for the parties, accompanies this brief.

SUMMARY OF ARGUMENT

At issue in this case is the propriety of the warrantless search of a parked motor home which had its curtains drawn. The police had the motor home under surveillance for over an hour and half yet made no effort whatever to obtain a warrant to search it for evidence of criminal activity, despite the fact that the motor home was located in a downtown metropolitan area close to a courthouse, and despite the fact that California authorizes telephonic warrants. See California Penal Code sections 1526(b) and 1528(b); People v. Ramos, 30 Cal.3d 553, 574, 639 P.2d 908, 180 Cal.Rptr. 266 (1982), reversed on other grounds; California v. Ramos, ____ U.S. ____, 77 L.Ed.2d 1171 (1983); People v. Morroniello, 145 Cal.App.3d 1,

9, 193 Cal.Rptr. 195 (1983); Bowyer v. Superior Court, 37 Cal.App.3d 151, 162-164, 112 Cal.Rptr. 226 (1974).

Petitioner seeks to justify the search on the ground that the motor home was a potentially mobile vehicle and as such fell within the automobile exception to the warrant requirement which applies to any vehicle which might be moved. Amicus submits that this approach, which focuses solely on mobility, completely ignores "the touchstone of [Fourth] Amendment analysis [which] has been the question whether a person has a 'constitutionally protected reasonable exception of privacy.' [Citation]" Oliver v. United States, ____ U.S. ____, 80 L.Ed2d 214, 223 (1984). It also ignores the facts of this case, which show that the motor home was parked and had its curtains drawn.

Amicus submits that when a person purchases a motor home which has a fully self-contained living compartment furnished similarly to an ordinary home, he or she enjoys a reasonable expectation that the motor home, while parked with its curtains drawn, will be treated as a home and the police will not search it without a warrant unless exigent circumstances require an immediate search.^{1/} In such a situation the motor home functions as a home, and those located inside it are likely to be engaged in activities of a private, personal or even intimate nature. This is particularly true in light of the fact that motor homes are

1. Since this case deals with a motor home in its role as a home (parked, curtains drawn), the case is not affected by considerations which might pertain to motor homes in their roles as vehicles, such as a stop of a traveling motor home.

frequently used as temporary retreats by vacationers and retirees.

The Constitution should protect parked motor homes to the extent of requiring the police to obtain a warrant in the absence of exigency.

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ARGUMENT

THE AUTOMOBILE EXCEPTION TO THE
WARRANT REQUIREMENT OF THE FOURTH
AMENDMENT DOES NOT INVARIABLY
APPLY TO A MOTOR HOME

A. Introduction

A motor home such as the one involved here is a hybrid-part home, part automobile. The court has traditionally drawn a distinction between automobiles and homes in relation to the Fourth Amendment and has upheld searches of automobiles in circumstances which would not justify a search of a home. South Dakota v. Opperman, 428 U.S. 364, 367 (1976). In the instant case, the Court is called upon to determine whether the facts of this case fall on the home or the automobile side of the distinction, or whether a new category should be created for motor homes. Amicus discusses in this brief several factors

to aid the Court in this task, First, this brief contains a discussion of principles of Fourth Amendment jurisprudence and case law as they relate to searches of homes and automobiles. Next, amicus discusses whether the motor home in this case, which was parked and had its curtains drawn, when viewed in terms of applicable constitutional considerations, is more appropriately governed by the case law involving homes or automobiles.

B. Principles of Fourth Amendment Jurisprudence

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing the Fourth Amendment, there has long been agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967).

"The exceptions to the warrant requirement are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971), footnotes omitted. Moreover, the scope of the search must be strictly tied to and justified by the circumstances which ren-

dered its initiation permissible. Terry v. Ohio, 392 U.S. 1, 19 (1968).

In Oliver v. United States, supra, 80 L.Ed.2d at 223, this Court recently reaffirmed that "[s]ince Katz v. United States, 389 U.S. 347 (1967) the touchstone of [Fourth] Amendment analysis has been the question whether a person has a the 'constitutionally protected reasonable expectation of privacy.' Citation. The Amendment does not protect the merely subjective expectation of privacy, but only 'those expectations that society is prepared to recognize as "reasonable."' Citation." See also Smith v. Maryland, 442 U.S. 736, 739 (1979) (holding that the expectation of privacy

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must be "justifiable," "reasonable," or "legitimate").

These principles of Fourth Amendment jurisprudence have recently been applied, along with historical and practical considerations, to searches of homes and automobiles.

C. Fourth Amendment Principles
Relating to Searches of homes

Searches of homes are afforded the greatest protection under the Fourth Amendment. It is an established principle that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . "United States District Court, 407 U.S. 297, 313 (1972). Indeed, the concern for protecting the home long predates the Fourth Amendment and has its roots in English common law. Payton v. New York, 445 U.S. 573, 591-598 (1980);

see also, People v. Eatman, 405 Ill. 491, 498, 91 N.E.2d 387, 390 (1950) (tracing the concern for the home past Lord Coke and to the Pandects). The Court has thus recognized as a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Payton v. New York, supra, 445, U.S. at 586; Steagald v. United States, 451 U.S. 204, 211-212 (1981); Coolidge v. New Hampshire, supra, 403 U.S. at 474-475.

And the Court has pointed out:
"The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: 'The right of the people

to be secure in their . . . homes . . . shall not be violated.' Payton v. New York, supra, 445 U.S. at 589. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). The protection against warrantless searches afforded to homes is not subject to question, having been recently reaffirmed by this Court in Welsh v. Wisconsin, ____ U.S. ____, 52 U.S.L.W. 4581 (1984). One's expectation of privacy in one's home is, in short, an expectation that society has long recognized as reasonable.

The expectation of privacy which one enjoys in one's home does not apply solely to one's permanent residence. It applies as well to temporary residences

such as a hotel, Stoner v. California, 376 U.S. 483, 489-490 (1964), and cases cited, and a rooming house, McDonald v. United States, 335 U.S. 451 (1948).

Since a parked motor home can function as a temporary residence no less than a hotel does, it too should be entitled to the protections afforded homes, as will be demonstrated later in this brief.

D. Fourth Amendment Principles
Relating to Searches
of Automobiles

As we have seen, homes, even temporary ones, are entitled to the greatest protection against warrantless searches. While automobiles are "effects" and therefore within the reach of the Fourth Amendment, there is a constitutional difference between houses and cars. Cady v. Dombroski, 413 U.S. 433, 439 (1973).

Thus, warrantless examinations of automo-

biles have been upheld in circumstances in which a search of a home or office would not. South Dakota v. Opperman, supra, 428 U.S. at 367; Chambers v. Maroney, 399 U.S. 42, 48 (1970).

The rationale behind both the automobile exception and distinction between homes and automobiles is twofold. First, the inherent mobility of automobiles ordinarily creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. Carrol v. United States, 267 U.S. 132 (1925); Coolidge v. New Hampshire, supra, 403 U.S. at 459-460.

Although traditionally the mobility justification was the primary factor underlying the automobile exception, recent decisions from this Court, upholding warrantless automobile searches

in situations where no immediate danger was presented that the car would be removed from the jurisdiction, indicate that there is no requirement of actual or eminent mobility. In Cady v. Dombroski, supra, a warrantless search of an automobile was upheld even though the car was disabled as a result of an accident, in control of the police, and the driver, the sole occupant, had been arrested and hospitalized. Similarly, in Chambers v. Maroney, supra, all occupants of the car had been arrested and the car taken to the police station. Yet, the warrantless search was upheld. In Cooper v. California, 386 U.S. 58 (1967), the warrantless search was upheld even though the occupant had been arrested and the car impounded. Finally, the Court has recently upheld the warrantless searches of cars which had been impounded.

Florida v. Meyers, ____ U.S. ____ (1984) (per curiam); Michigan v. Thomas, 458 U.S. 259 (1982). In short, when one looks to the mobility favor, it appears that warrantless searches of vehicles will be upheld even if the possibility of the vehicle being removed is "remote, if not non-existent." Cady v. Dombrowski, supra, 413 U.S. at 441-442.

But this court's treatment of automobiles "has been based [only] in part on their inherent mobility." United States v. Chadwick, 433 U.S. 1, 12 (1977). As noted earlier in this brief, the touchstone of Fourth Amendment jurisprudence is whether a person has a constitutionally protected reasonable expectation of privacy in the place searched. Oliver v. United States, supra, 80 L.Ed2d at 223. This principle has been applied to automobile searches,

and the Court has found that it is the diminished expectation of privacy surrounding the automobile which also justifies the automobile exception.

(United States v. Chadwick, supra, 433 U.S. at 12.

A variety of factors diminish the expectation of privacy for automobiles. Automobiles, unlike homes, are subjected to periodic inspection and licensing requirements and, as part of what this Court termed the "community caretaking function," vehicles are frequently taken into police custody for traffic control or excessive parking violations. Cady v. Dombrowski, supra, 413 U.S. at 441; South Dakota v. Opperman, supra, 428 U.S. at 368-369. The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel.

"One has a lesser expectation of privacy in a motor vehicle its function is transportation and it seldom serves as one's residence or as a repository of personal effects. . . It travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v. Lewis, supra, 417 U.S. at 590.

In light of these factors it would not be objectively reasonable for a person who purchases an automobile to believe that the police will treat it as they would a home. But this case does not concern a simple automobile. A motor home is a hybrid which combines aspects of both homes and automobiles. Therefore, motor homes are not governed by the rules pertaining to automobiles.

E. Application of Fourth Amendment Principles to Motor Homes

To recapitulate, this case presents a hybrid. A motor home has the mobility of an automobile combined with the residential characteristics and pri-

vacy expectations of a home. The question is whether, for purposes of the Fourth Amendment, motor homes should, to some extent, be given the protection afforded homes or whether as petitioner has done, the court should ignore the high expectation of privacy in the motor home and treat it as if it were nothing more than an ordinary automobile. Amicus suggests that most of the factors which dilute the expectation of privacy in automobiles are inapplicable to motor homes, and that the expectation of privacy in a parked motor home is equivalent to that for a home.

Undeniably, motor homes are as inherently mobile as an ordinary automobile. However, even for the automobile exception when inherent, as opposed to actual, mobility is urged as a justification for a warrantless search, its true

basis is the reduced expectation of privacy which applies to a mere automobile.

United States v. Chadwick, supra, 433

U.S. at 12. Indeed, "[t]he word

'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New

Hampshire, supra, 403 U.S. at 461.

"[T]he exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable governmental intrusion." Cardwell v. Lewis, supra, 417 U.S. at 591.

A person has a greater reasonably objective expectation of privacy in a motor home than in a typical automobile. Ordinarily a motor home serves a function above that of merely providing transportation. The motor home often serves as a permanent or temporary residence. The motor home can be permanently placed in a

mobile home park which makes it even more consistent with a home. Even if the motor home is for temporary residential use, such as on a vacation trip, the motor home serves the same function as a hotel or motel. This court has repeatedly stated that a person who utilizes a hotel or motel has a constitutionally protected right to be free of warrantless intrusion even though he or she does not own the premises or reside there permanently. Stoner v. California, supra, 376 U.S. at 489-490; United States v. Jeffers, 342 U.S. 42 (1951); Lustig v. United States, 338 U.S. 74 (1949). There is no legitimate reason why a person traveling in a motor home should be denied the same protection merely because he or she chose to utilize a motor home instead of a hotel or motel. Indeed, a motor home is more like a home

than a motel or hotel since it is owned by its occupant, it is a permanent repository of personal effects and persons such as maids and managers have no access to it.

Amicus notes that even the most frail home "is absolutely entitled to the same guarantees of privacy as the most majestic mansion." United States v. Ross, 456 U.S. 798, 822 (1982)

In keeping with this principle, the guarantee of privacy in a home should not be reduced simply because the home is temporary or is potentially mobile.

Motor homes also serve as a repository for personal effects apart from that contained in an ordinary automobile. Motor homes are equipped with beds, refrigerators, toilet facilities and receptacles for clothing and other personal items. Furthermore, motor homes

are normally not open to public view as with most automobiles. Motor homes are equipped with either small or tinted windows, shades or drapes which prevent exposure of the occupants and personal effects as well as precluding anyone from seeing inside.

Moreover, although they could be used for such daily activities as driving to and from work, shopping and other errands for which one would use a regular automobile, motor homes are not ordinarily used for such purposes. And when they are used for such purposes, it is often incidental to their use as a residence such as stopping in a town to purchase food or sundries or to do laundry.

While motor homes, like automobiles, are subject to periodic inspection and to licensing requirements, this does

not ordinarily extend to an invasion of the living quarters of the motor home, and does not greatly reduce the expectation of privacy in the motor home. And, as has been shown, while an automobile "seldom serves as one's residence or as a repository of personal effects," (Cardwell v. Lewis, supra, 417 U.S. at 590) motor homes ordinarily serve such functions, indeed, they are designed and purchased in order to serve such functions.

This court has consistently held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable" or a "legitimate expectation of privacy" that had been invaded by the government action. Smith v. Maryland, supra, 442 U.S. at 740; Rakas v. Illinois, 439 U.S.

128, 143.. The inquiry, as Justice Harlan noted in his concurring opinion in Katz v. United States, 389 U.S. 347, 361 (1964), and as the court reiterated in Smith v. Maryland, supra, 442 U.S. at 740, normally embraces two discrete questions. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' [Citation], whether, in the words of the Katz majority, the individual has shown that 'he seeks to preserve [something] as private.'" The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,'" [Citation] Smith v. Maryland, 442 U.S. at 740.

"No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not

authorized by a warrant. Citations. In assessing the degree to which a search infringes upon individual privacy, the court has given weight to such factors as the intention of the framers of the Fourth Amendment, e.g., United States v. Chadwick, 433 U.S. -1, 7-8 (1977), the uses to which the individual has put a location, e.g., Jones v. United States, 362 U.S. 257, 265 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v. New York, 445 U.S. 573 (1980)."Oliver v. United States, supra, 80 L.Ed2d at 223-224.

By analyzing these factors in the instant case, this Court should conclude that respondent had a legitimate and reasonable expectation of privacy in the motor home.

Respondent's motor home was parked on a lot with closed curtains including one across the front window and remained in this condition for over an hour and a half. Under these circumstances, respondent most assuently sought to prevent any exposure or

invasion of privacy from outside.

This expectation of privacy is also one which society already recognizes. Our society uses a large number of motor homes, not only for traveling but for permanent or temporary living quarters as well. While an automobile "seldom serves as one's residence or as a repository of personal effects," (Cardwell v. Lewis, supra, 417 U.S. at 590) a motor home, as its name implies, usually does. Indeed, it serves a residential purpose, at least temporarily, when one parks it and closes the curtains.

The fact that the motor home in this case was not parked at motor park or campground is of little constitutional significance. Just as one can go to one's house for an hour and a half to eat lunch and to take a nap, one can do the

same thing by parking it on a street or in a parking lot.

Society as a whole recognizes that motor homes function as homes. Our nation has numerous motor home parks as well as established motor home communities where our citizens place their homes permanently and temporarily. Furthermore, motor homes have traditionally been residences for vacationers, retirees or elderly persons. This is so because one can live in a motor home on a modest income. If this court treats motor homes as mere automobiles, it would do little, if nothing, to honor the privacy expectations of a large segment of our society.

Petitioner correctly notes that some courts have included motor homes within the automobile exception. See Petition for Writ of Certiorari 16-17,

24-25. A review of those cases shows no appreciation of the residential functions which motor homes serve, the personal, private and intimate activities which occur inside parked motor homes, or the importance of a citizen's reasonable expectation of privacy when purchasing and using a motor home. In contrast, courts which have appreciated these factors, and have considered them against the rationales for the automobile exception, have ruled that it is the expectation of privacy which prevails. United States v. Wiga, 662 F.2d 1325, 1329 (9th Cir. 1981), cert. denied, 449 U.S. 918 (1982); United States v. Williams 630 F.2d 1322, 1326 (9th Cir.), cert. denied, 449 U.S. 865 (1980); People v. Carney, 34 Cal.3d 597, 603-610, 668 P.2d 807, 194 Cal.Rptr. 500 (1983).

In summary, a motor home is more consistent with the uses of a private residence while an automobile is not. A parked motor home with its curtains drawn should be protected from warrantless searches and seizures at least to the extent of requiring officers to obtain a warrant prior to searching the motor home.

It should also be noted that requiring stringent warrant requirements for motor homes poses no greater burden or confusion for police officers than that created by the line of cases which discuss the extent to which the police may search an ordinary automobile.^{2/}

2. Even if law enforcement could be made more efficient if officers were not required to obtain a warrant, that fact does not justify abrogation of the warrant requirement. [T]he privacy of a person's home and property may not be

Motor homes are easily distinguishable from a typical automobile. Though they are mobile, if officers have probable cause to believe illegal activity is being conducted inside, they can conduct surveillance of the motor home until a warrant is issued. For instance in this case, the police had previously received information that illegal activities were being conducted in respondent's motor home, and the police kept respondent's motor home under surveillance for over an hour and a half. It would have required little effort for the police to have obtained a warrant in person from a magistrate or to have utilized California's telephonic warrant procedure. See p. 2 of this brief, supra.

(footnote 2 continued)
totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." Mincey v. Arizona,

Amicus recognizes that this Court has recently attempted, where feasible, to provide rules in the Fourth Amendment context which are easily understood and applied by the police. See, e.g., New York v. Belton, 453 U.S. 454, 458 (1981). Consistent with this approach, the position taken in this brief provides easily understood guidelines. This Court also recognizes that the privacy of a person's home and property are not to be totally sacrificed in the name of maximum simplicity in enforcement or the criminal law. Mincey v. Arizona, supra 437 U.S. 394. Requiring the police to attempt to obtain a warrant before searching a parked motor home is a rule which furthers both goals.

A true motor home--one purchased and used in the reasonable expectation that it will be treated as a home when it

is serving that function either permanently, or temporarily--is easily identifiable as such. Just as the police can distinguish a sedan from a station wagon, they can and do distinguish motor homes from mere automobiles when, for example, broadcasting descriptions of stolen or suspect vehicles. Indeed, police constantly make such distinctions when enforcing the California Vehicle Code. For example, while sections 23221 and 22223 of that code prohibit the drinking of alcoholic beverages or the possession of an open container of an alcoholic beverage in motor vehicle, section 23229(a) expressly exempts "the living quarters of a housecar or camper." Petitioner seriously underestimates the abilities of the police when he suggests that police officers are incapable of making distinctions which they in fact

routinely make in their work. See
Petition for Writ of Certiorari 28-29.

There is no problem in identifying large motor homes, such as a 30 foot Pace Arrow or Winnebago. External features reasonably identify smaller motor homes. See People v. Carney, supra, 34 Cal.3d at 607.

The position taken in this brief provides necessary guidance for the police. Once they observe external features which identify the vehicle as a motor home and see that it is parked, they must attempt to obtain a warrant, either personally or telephonically, before searching it. If something arises which makes the obtaining of a warrant unfeasible--such as a true exigency or actual or imminent movement--they may treat the motor home as an automobile.

The rule here advanced, in short, adequately serves all pertinent constitutional and societal values. It respects the great expectation of privacy which pertains to temporary and permanent residences, which include motor homes. It appreciates the distinction between motor homes and automobiles, it is easy to apply since it involves a distinction which police routinely make when describing stolen or suspect vehicles. It is a rule which permits the police to dispense with the warrant requirement when it appears necessary to do so.

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CONCLUSION

Motor homes serve as temporary and permanent homes for a large number of citizens, including vacationers and retirees. Persons buying motor homes do so in the objectively reasonable expectation that they will use motor homes as a temporary or permanent residence and will engage in personal, private and intimate activities in their motor homes.

Police should be required to make some effort to honor the privacy expectations of the occupants of parked motor homes by making an attempt to obtain a search warrant, either personally or telephonically, Accordingly,

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we submit that the judgment of the
California Supreme Court should be
affirmed.

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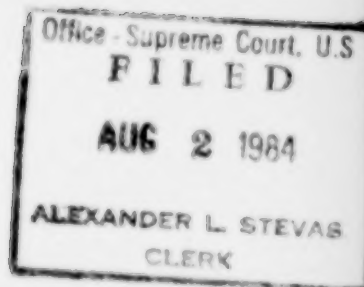
Respectfully submitted,

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June 29, 1984



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Respondent.

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RESPONDENT'S BRIEF ON THE MERITS

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October Term, 1983

CALIFORNIA,
Petitioner,

-vs-

CHARLES R. CARNEY,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

JURISDICTION

THE WRIT OF CERTIORARI SHOULD BE
DISMISSED SINCE A DECISION IN THIS CASE
WILL BE MERELY ADVISORY OF FEDERAL RIGHTS
AND WILL NOT CHANGE THE JUDGMENT.

The policy of avoiding advisory
opinions on federal constitutional issues
is deeply rooted in this Court's decisions.
Herb v. Pitcairn, 324 U.S. 117, 126 (1945),

warns:

"[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion."

Therefore, the Court has consistently held that it will not review a state court judgment that is based on an adequate and independent state ground. Herb v. Pitcairn, 324 U.S. at 128; Michigan v. Long, 463 U.S. __, __ (1983).

Furthermore, this Court's jurisdiction is limited by Article III, section 2 of the Constitution and 28 U.S.C. section 1257(3) to review of federal questions; this precludes the Court from

correcting the California Supreme Court's exposition of state constitutional law.

The state court decision in this case is explicitly based on Article I, section 13 of the California Constitution, a provision prominently and independently cited by the California Supreme Court before mention of the Fourth Amendment. (Pet.App. A-6) ^{1/} Significantly, the California Supreme Court majority indicates the Fourth Amendment protections are only "similar" to the protections provided by Article I, section 13 of the state constitution. (Pet.App. A-6)

^{1/} The initial citation of legal authority by the California Supreme Court in its opinion is as follows: "Article I, section 13 of the California Constitution establishes the right of the people of this state to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." It is then noted the federal constitution "provides a similar guarantee." (Pet.App. A-6)

The distinct state exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), established before Mapp v. Ohio, 367 U.S. 643 (1961), provides an adequate and independent state law basis for the decision to suppress evidence in this case.

Michigan v. Long, 463 U.S. at ____ adopts an "assumption" that no adequate and independent state grounds exist for a state court decision when "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."

It therefore appears the Michigan v. Long "assumption" in favor of jurisdiction arises only (1) when the adequacy and independence of a state ground for

the decision is "unclear" from the opinion, and (2) when the state court decision relies "primarily" on federal law or is "interwoven" with federal law. 2/

The California Supreme Court opinion in this case satisfies neither of the requirements in Michigan v. Long to support an assumption of jurisdiction.

First, Article I, section 13 of the California Constitution is obviously an "adequate" basis for the decision alternative to the federal constitution. The California Supreme Court has pointedly recognized that "California citizens are entitled to greater protection under

2/ The state court decision in Michigan v. Long mentioned the state constitution twice, but relied exclusively on federal law, not citing a single state case to support its holding of unreasonable search. Michigan v. Long could be fairly interpreted to indicate when state law is cited as an "afterthought," its adequacy and independence as a basis for the decision is not established.

the California Constitution against unreasonable searches and seizures than that required by the United States Constitution..." People v. Brisendine, 13 Cal.3d 528, 551, 119 Cal.Rptr. 315, 531 P.2d 1099 (1975).

It is equally obvious the California Constitution is "independent" of federal law. The California Constitution itself requires state courts to consider its provisions independently. Therefore, the California Supreme Court in People v. Norman, 14 Cal.3d 929, 939 fn. 10, 123 Cal.Rptr. 109, 539 P.2d 237, (1975) indicated:

"The people of this sovereign state have directed that we give a meaning to constitutionally guaranteed rights which is independent of limits fixed by the United States Supreme Court as applicable to

parallel rights guaranteed by the United States Constitution. Article I, section 24 of the California Constitution thus declares that 'Rights guaranteed by this Constitution are not dependent upon those guaranteed by the United States Constitution.'"

The independent nature of the state constitution is clearly explicit in the document itself. Surely Michigan v. Long does not require the California state courts to endlessly reiterate explicit provisions of the California Constitution in order to make plain the independent vitality of the state charter. Citation of the California Constitution necessarily invokes the express provisions of Article I, section 24 affirming that Californians' state rights are "not dependent on those guaranteed by the United

States Constitution."

The second requirement for use of the Michigan v. Long assumption, that "the state court rested its decision primarily on federal law," is likewise not satisfied here.

The central issue before the California Supreme Court was which of the established rules of search and seizure law should be applied to the peculiar facts, rules relating to search of vehicles or rules relating to search of homes. The pivotal doctrines at issue were set forth with reference to state court cases which had been decided on state constitutional grounds. Wimberly v. Superior Court, 16 Cal.3d 557, 563, 128 Cal.Rptr. 641, 547 P.2d 417 (1976); People v. Ramey, 16 Cal.3d 263, 271, 127 Cal.Rptr. 629, 545 P.2d 1333 (1976).

In setting forth the scope of

permissible vehicle searches, the California Supreme Court relies first on its own decision in Wimberly v. Superior Court, 16 Cal.3d at 563. The court indicates "[o]ur formulation" of the automobile exception requires a showing that "(1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search." (Pet. App. A-10) The California Supreme Court formulation of the automobile exception is plainly more exacting than the federal standard set out in United States v. Ross, 456 U.S. 798 (1982). And while the opinion notes the genesis of an "automobile exception" to the warrant requirement in Carroll v. United States, 267 U.S. 132 (1925), it expressly states "California courts have independently relied on similar reasoning" to fashion

the automobile exception in state courts. (Pet.App. A-11) In addition, for the principle that "Homes are afforded the maximum protection from warrantless searches and seizures," the California Supreme Court relies on its own decision in People v. Ramey, 16 Cal.3d 263, 271, 127 Cal.Rptr. 629, 545 P.2d 1333 (1976). (Pet.App. A-19)

The opinion does consider and discuss decisions of this Court, but in California courts "decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." People v. Longwill, 14 Cal.3d 943, 953 fn. 4, 123 Cal.Rptr. 297, 538 P.2d 753 (1975). Therefore, the California Supreme Court considers itself

"informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions" when construing the state constitution. Reynolds v. Superior Court, 12 Cal.3d 834, 842, 117 Cal.Rptr. 437, 528 P.2d 45 (1974). In People v. Brisendine, 13 Cal.3d 528, 548, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975) the California Supreme Court advises:

"This court has always assumed the independent vitality of our state Constitution. In the search and seizure area our decisions have often comported with federal law, yet there has never been any question that this similarity was a matter of choice and not compulsion."

The decision of the California Supreme Court here does not directly conflict with any previous decisions of this Court. It is therefore hardly

surprising the opinion does not distinguish between a state rule and a federal rule since the California court considered the federal constitution to be no less protective of rights than the state constitution. The only federal cases on point agree with the decision in this case. United States v. Williams, 630 F.2d 1322 (9th Cir., 1980), cert. denied, 449 U.S. 865; United States v. Wiga, 662 F.2d 1325 (9th Cir., 1981) cert. denied, 456 U.S. 918 (1982).

Emphatically, the decision in Michigan v. Long, 463 U.S. at ____ "does not in any way authorize the rendering of advisory opinions." If the same judgment would be rendered by the California court after this Court corrected its views of federal law, a decision will be merely advisory. Michigan v. Long should be interpreted to preclude decision in cases,

such as this case, when it can be anticipated on remand the state court will merely repeat its previous decision deleting reference to the federal constitution. 3/

Here, even if this Court were to determine the federal question was erroneously decided, the California Supreme

3/ The spectre of state courts ignoring this Court's advice on federal law and deciding a case on remand based on a state constitution has already been realized. State v. Opperman, 89 S.D. 25, 228 N.W.2d 152 (1975), reversed, South Dakota v. Opperman, 428 U.S. 364 (1976), on remand, State v. Opperman, 247 N.W.2d 673 (1976); State v. Chrisman, 94 Wash. 2d 711, 619 P.2d 971, (1980), reversed, Washington v. Chrisman, 451 U.S. 1 (1982), on remand, State v. Chrisman, 100 Wash.2d 814, 676 P.2d 419; State v. Neville, 312 N.W.2d 723 (1981), reversed, South Dakota v. Neville, 459 U.S. 553 (1983), on remand, State v. Neville, 346 N.W.2d 425 (1984); Bellanca v. New York State Liquor Authority, 50 N.Y.2d 524, 407 N.E.2d 460 (1980), reversed, New York Liquor Authority v. Bellanca, 452 U.S. 714 (1981), on remand, Bellanca v. New York Liquor Authority, 54 N.Y.2d 228, 429 N.E.2d 765 (1981).

Court's decision under the state constitution will not be altered and the judgment suppressing the evidence will not be affected. Under the California doctrine of the "law of the case," once a principle or rule of law necessary to the decision has been decided in an opinion on appeal, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress. Furthermore, the rule must be adhered to "although in its subsequent consideration, [the] court may be clearly of the opinion that the former decision is erroneous in that particular...Indeed, it is only when the former rule is deemed erroneous that the doctrine of the law of the case becomes at all important." Tally v. Ganahl, 151 Cal. 418, 421, 90 P.2d 1049 (1907).

Even if the California Supreme Court

misconstrued the federal authorities discussed in the opinion, and even if this Court were to correct its views of federal law, it can be anticipated the California Supreme Court will reach the same result on remand as it has previously.

The Court's understandable reluctance "in most instances...to examine state law in order to decide the nature of the state court decision" (Michigan v. Long, 463 U.S. at ___) must yield to the greater jurisdictional concern that the Court not render an advisory opinion.

STATEMENT OF THE CASE

During the afternoon of May 31, 1979 (a Thursday), Drug Enforcement Administration Agent Robert Williams was conducting a surveillance investigation in San Diego, following a subject. Agent Williams noticed Respondent Charles R. Carney and kept an eye on him because "he did not look like he fit in the area there, and he was approaching a Mexican boy [sic] and talking to him;" (JA 9,10) Williams estimated the "boy's" age to be "under 18 -- 15, 16, maybe 17." (RT 15) Mr. Carney and the young man proceeded to a nearby parking lot and entered a parked Dodge Motor Home. (JA 12) Williams observed the curtains in the motor home being closed after the two entered. (JA 13)

Noting the license plate number

of the motor home, Williams recalled uncorroborated information he had received anonymously of marijuana being exchanged for sex with males by an unidentified man associated with the motor home. (JA 12)

"Back-up" units were called and agents continued to watch the parked motor home for approximately an hour and fifteen minutes while Mr. Carney and the young man were inside. (JA 13) After the young man had exited the motor home, the agents stopped him and in response to their questioning, he claimed the occupant of the motor home had given him marijuana in exchange for oral sex. (JA 13,14,15)

Williams took the young man back to the motor home and had him knock on the door of the living quarters. Mr. Carney opened the door and stepped outside. (JA 15)

Agent Clem then physically entered the motor home looking for other occupants (JA 20,21,22) and observed marijuana on a table inside. Nothing in the record suggests Clem's entry was based on a claim of probable cause to search for contraband. Mr. Carney was arrested and the motor home was driven to the police station where additional marijuana was discovered during a search of the cupboards and refrigerator. No warrant was ever obtained.

SUMMARY OF ARGUMENT

This case involves the warrantless entry and search of the living quarters of a motor home. The vehicle had not been stopped on a highway, but was parked in an off-street parking lot. A warrant could easily have been obtained.

Petitioner urges the Court to ignore any reasonable expectation of privacy in the living quarters of the parked vehicle, suggesting inherent, but entirely theoretical, mobility alone should justify the warrantless police intrusion. In essence, Petitioner argues for an "inherent mobility" exception to the warrant requirement, a concept repeatedly rejected by this Court.

In evaluating the legitimacy of the search, the Court should consider all the factors which have played a role in the adoption and application of an

"automobile exception." It should consider Mr. Carney's reasonable expectation of privacy in the living quarters of the motor home; it should consider whether the vehicle was actually in transit and whether a risk the motor home would be moved was real or merely speculative; and it should consider whether law enforcement would have been significantly burdened by obtaining a warrant.

Respondent suggests that before a warrantless entry of the living quarters of a motor home may be made, a genuine as opposed to an entirely hypothetical necessity for dispensing with the warrant requirement must exist. This standard will permit application of the automobile exception to the living quarters of a motor home when the reason for such an exception exists and at the same time it accomodates a person's

reasonable expectation of privacy in residential areas.

ARGUMENT

WARRANTLESS ENTRY INTO THE LIVING
QUARTERS OF A PARKED AND IMMOBILIZED
MOTOR HOME WAS UNJUSTIFIED UNDER THE
AUTOMOBILE EXCEPTION.

This case pits one of the core protections of the Fourth Amendment, protection of one's dwelling space from invasions by government agents, against the public need for effective law enforcement. This brief suggests that both interests may be accommodated within the framework of the case at hand.

The California Supreme Court opinion proceeds from the obvious premise "there is a constitutional difference between houses and cars" (Pet.App. A-10), a

distinction said to have originated in the "inherent mobility of automobiles." (Pet.App. A-11) However, the opinion also notes numerous cases upholding warrantless searches of automobiles where mobility played no role at all since the vehicles were either disabled or already in the exclusive control of the police, cases "in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). In explaining this seeming contradiction between the reason for an automobile exception and the actual application of the exception, the opinion quotes United States v. Chadwick, 433 U.S. 1, 12 (1977) that "the answer lies in the diminished expectation of privacy which surrounds the automobile."

This Court has recognized "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property," Arkansas v. Sanders, 442 U.S. 753, 761 (1979); privacy interests are diminished because an automobile's "function is transportation and it seldom serves as one's residence or as the repository of personal effects" and "[i]t travels public thoroughfares where both its occupants and its contents are in plain view." Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion). The "obviously public nature of automobile travel" has therefore been recognized to justify more liberal rules for warrantless searches of vehicles. South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

Juxtaposed against this general

Fourth Amendment doctrine, the privacy interests of Mr. Carney in the sanctity of the living quarters in his motor home were considered by the California Supreme Court. Residential areas, temporary or permanent, are afforded the highest degree of protection from warrantless entry, Stoner v. California, 376 U.S. 483, 490 (1964); "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Payton v. New York, 445 U.S. 573, 585 (1980). As recently as United States v. Karo, __ U.S. __, 52 U.S.L.W. 5102, 5104 (July 3, 1984), this Court has indicated:

"At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free from governmental intrusion not authorized

by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances."

The California Supreme Court recognized that "[t]o the extent an individual uses a motor home as his permanent or temporary residence, it, as much as a house, serves as his 'place of refuge' in which he should be 'free from unreasonable governmental intrusion.'" (Pet. App. A-23, A-24, quoting Silverman v. United States, 365 U.S. 505, 511 (1961).) The court therefore declined to apply the automobile exception to the facts of this case.

In briefs filed here, California and the other states appearing as amici would have the Court apply the "automobile exception" automatically and invariably to justify all warrantless searches of every potentially mobile vehicle, without regard to where the vehicle is located; without regard to how it is being used; without regard to any legitimate privacy interest in the vehicle; and without regard to any necessity for dispensing with the ordinary warrant requirement. California and the amici states urge the Court to abandon any analysis of reasonable privacy expectations in addressing Fourth Amendment issues involving a potentially mobile vehicle, and, by extension, any

potentially moveable object or effect. ^{4/}

Automatic application of the automobile exception to the facts of this case without any consideration of Mr. Carney's reasonable expectation of privacy in the living area of his immobilized motor home stretches the reason and necessity for an automobile exception too far.

^{4/} Several issues which may seem to lurk on the fringes of this case are not raised by the facts or by Petitioner. First, the motor home was physically entered by the officers and no plain view observations are claimed to have been made from outside the living compartment. (JA-21 & JA-22) This case is entirely unlike Washington v. Chrisman, 451 U.S. 1 (1982), since the entry and initial search preceded Mr. Carney's arrest. This was not a search incident to arrest. Furthermore, the state does not challenge the California Supreme Court's conclusion the officer was not justified in entering the living compartment to look for other occupants since the prosecution failed to prove any specific articulable facts known by the officers to support a suspicion other persons may have been inside.

Three significant factors warrant rejection of the automobile exception under the facts of this case:

First, the area searched, the living quarters, is an area traditionally associated with the greatest expectation of privacy.

Second, the vehicle was not in transit or stopped on a roadway when the reasons for the search arose and when the search occurred; instead, it was parked off the public street and was being used as a residence.

Third, no genuine need for an immediate search was presented since a warrant could have easily and practicably been obtained.

Privacy expectations in living quarters.

In suggesting the Court abandon any consideration of privacy expectations in this case, Petitioner does not contest the reasonable expectation of privacy reposed in the areas searched here, the living quarters, the drawers, cupboards and the refrigerator of the motor home. The motor home at issue was equipped with curtains, a bed, chairs, a table, kitchen features, and other accouterments of a residence. Whatever diminished expectation of privacy may surround an ordinary automobile or even the driving area of a motor home, the obvious function of the living area was residential, a place designed and used as a sanctuary to escape the intrusions of society. The privacy interest in such an area is manifest.

The Court recently observed that "the touchstone" of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy." Oliver v. United States, ___ U.S. ___, 52 U.S.L.W. 4425 (April 4, 1984). Petitioner's argument to disregard any reasonable expectation of privacy in living quarters of a motor home should be rejected. The Solicitor General cogently suggests that "[g]iven the importance of the expectation of privacy factor to the rationale underlying the automobile exception...the doctrine should not uncritically be applied to motor homes simply because they are moveable vehicles." (Brief of the United States as Amicus Curiae, page 12.)

Urging that the Court abandon any consideration of reasonable expectation of

privacy in applying the automobile exception to the facts of this case, Petitioner suggests "inherent mobility" alone will always justify a warrantless probable cause search. This extreme position ignores the fact potential mobility alone has never justified warrantless searches. United States v. Ross, 456 U.S. 798, 809-810 (1982) points out the Court in United States v. Chadwick, 433 U.S. 1 (1977) "squarely rejected" an argument any moveable container that is believed to carry contraband may be searched without a warrant. If potential mobility alone were sufficient reason to dispense with the warrant requirement, Chadwick would have been decided differently.

Chadwick holds there is no "inherent mobility" exception to the warrant requirement.

Mobility as a diminished factor.

The vehicle entered and searched here had not been stopped by police while in transit, a factor which has usually played a significant role in application of the automobile exception. The motor home had been parked in an off-street parking lot for an unknown but extended period of time before any cause or suspicion to search arose. Every indication in the record points to a conclusion the motor home was not being used for transportation but as a residence.

United States v. Ross, 456 U.S. at 806 indicates the automobile exception grew out of a recognition of "the impracticability of securing a warrant in cases involving the transportation of contraband goods." Ross further indicates: "Given the nature of an automobile in transit, the Court recognized that an immediate

intrusion is necessary if police officers are to secure the illicit substance." However, when a vehicle is not in transit, an immediate intrusion is unnecessary since feasibility of obtaining a warrant is significantly increased.

Mobility, as a factor to render the securing of a warrant impracticable, was purely theoretical in this case since the motor home was immobilized; accordingly, mobility is nonexistent as a justification for excusing the ordinary requirement for a warrant here.

Feasibility of obtaining a warrant.

Here there was a total lack of any exigency or necessity for an immediate, warrantless entry and search. There is no indication in the record of even a remote threat the vehicle would be moved from its off-street parking location. After Mr. Carney exited the living

quarters, the vehicle was unoccupied. Petitioner suggests no concrete need for an immediate warrantless entry and search except police convenience. In short, there is no indication of any genuine need for the officers to make an entry without first securing a warrant.

The feasibility and ease of obtaining a warrant under the circumstances in this case are striking. The search occurred on a weekday afternoon while the motor home was parked within a few hundred yards of the courthouse where scores of magistrates were available, ready to issue a warrant. No legitimate claim can be made that obtaining a warrant would have been burdensome or impractical.

The need for an immediate, warrantless search was entirely hypothetical since police could easily have sought a magistrate's permission without

compromising the investigation.

Real rather than theoretical need.

The Solicitor General's suggestion that the automobile exception be applied to a motor home only when it is being used primarily for transportation, is well reasoned. This analysis recognizes the significance of the privacy interests in motor home living quarters, while at the same time accomodating the practical needs of law enforcement to engage in warrantless searches of private places when genuine, as opposed to theoretical, necessity requires such action.

Under this analysis, when a motor home is stopped while in transit, the same considerations making the securing of a warrant for an automobile impractical would usually be sufficient to establish genuine necessity for immediate search of a motor home. Likewise, when

there is reason to believe evidence is being destroyed, or where other specific and articulable exigency necessitates immediate entry of a parked motor home, warrantless entry of the living quarters would be justified under existing law. Such a warrantless entry of motor homes based on an emergency doctrine was approved in both United States v. Williams, 630 F.2d 1322 (9th Cir., 1980) and United States v. Wiga, 662 F.2d 1325 (9th Cir., 1981).

Requiring real, as opposed to purely theoretical necessity when applying the automobile exception to the living quarters of a parked motor home strikes an appropriate balance between the privacy interests of persons using motor homes for residential purposes and the need for effective law enforcement techniques. More importantly, it comports with the

reasons for an automobile exception to the warrant requirement under the Fourth Amendment.

PETITIONER UNDERESTIMATES THE ABILITY OF POLICE OFFICERS TO RECOGNIZE A MOTOR HOME.

Petitioner and the amici states argue police officers are unable to distinguish between an automobile and a motor home and therefore police will be unable to apply any rule which seeks to accomodate the reasonable expectation of privacy a person may have in a motor home. Ultimately, Petitioner argues a motor home distinction is "too technical," apparently based on a belief police are only able to remember and apply the simplest of rules.

This argument underestimates the training and abilities of professional

police officers and fails to recognize they are routinely required to draw similar distinctions and enforce much more technical criminal laws constantly.

For example, California police officers are currently required to distinguish between motor homes and ordinary vehicles. California Vehicle Code section 362 provides "A 'house car' is a motor vehicle originally designed, or permanently altered, and equipped for human habitation..." The definition is significant since California Vehicle Code sections 23225 and 23226 prohibit keeping or storing an open alcoholic beverage container in a vehicle, except "the living quarters of a housecar." California Vehicle Code sections 23221 and 23223 prohibit consumption or possession of opened alcoholic beverages in a vehicle, but section 23229 specifically exempts

"the living quarters of a housecar."

California police commonly enforce these particular laws and in doing so are called on frequently to distinguish between an ordinary vehicle and the living quarters of a motor home.

While Petitioner's desire for "bright-line" rules is understandable, neither the concept of probable cause nor the bulk of criminal law itself is readily amenable to "bright-line" distinctions. The substantive criminal law is clotted with "hair-splitting" distinctions, and yet we rely on professional police officers to make instantaneous evaluations and act on these decisions every day when enforcing the criminal law.

The California Supreme Court standard for determining whether a vehicle is a motor home is not so excessively

vague as to seriously impede effective law enforcement. The California Supreme Court merely requires an evaluation of the "outward appearance of a motor home" to determine whether it objectively appears "likely to be serving as at least a temporary residence." (Pet.App. A-29) Notably, the Solicitor General also would distinguish between a vehicle "that is primarily functioning as a vehicle and one that is primarily functioning as a residence." (Brief of the United States as Amicus Curiae, page 18.) The requirement of objective, outward appearance of primary function is sufficient guidance for experienced law enforcement personnel.

There is no debate the vehicle involved in this case was a motor home. Distinguishing between a motor home and other vehicles will be elementary and nearly instinctive in all but the rarest

of circumstances. To argue the term "motor home" is excessively vague is to engage in a largely academic exercise. The concept of what constitutes a motor home is sufficiently clear to withstand the kind of vagueness arguments advanced by Petitioner.

CONCLUSION

The California Supreme Court has already determined the entry and search violated the state constitution and that decision will not be altered by an advisory opinion from this Court on federal Fourth Amendment law. The writ of certiorari should be dismissed as improvidently granted since the decision of the California Supreme Court to suppress evidence was based on an adequate and independent state ground.

If the merits are reached, the Court

should decide a person's reasonable expectation of privacy in the living quarters of a motor home parked off the public street sufficiently outweighs any legitimate law enforcement need to engage in a warrantless entry and search when a warrant could have been obtained easily and practicably. Under the circumstances of this case, the judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

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NO. 83-859

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CLERK

IN THE

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REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I

THE CALIFORNIA SUPREME COURT'S REVERSAL
RESTED SOLELY ON THE FEDERAL CONSTITUTION

In People v. Carney (1983) 34
Cal.3d 597 [194 Cal.Rptr. 500; 668 P.2d
807], the California Supreme Court held:

"Accordingly, we conclude that
a motor home is fully protected
by the Fourth Amendment and is

not subject to the 'automobile exception.' Of course this does not preclude all warrantless searches of motor homes: it simply means that such searches cannot be justified by that particular exception to the warrant requirement. We therefore proceed to inquire into the remaining justification for the search offered by the People." (Id., at p. 610, emphasis added.)

Contrary to respondent's contention, no independent state ground appears as the basis for the California Court's reversal. (Respondent's Brief on the Merits, pp. 1-15.) Had the California Supreme Court intended to base their reversal on state grounds they would have explicitly done so.

(Compare, People v. Superior Court (Valdez) (1983) 35 Cal.3d 11, 15-16 [196 Cal.Rptr. 359; 671 P.2d 863]; People v. Chavers (1983) 33 Cal.3d 462, 466-469 [189 Cal.Rptr. 169; 658 P.2d 96];

People v. Minjares (1979) 24 Cal.3d 410,
424 [153 Cal.Rptr. 224; 591 P.2d 514].)
Consequently, there is no bar to this
Court considering the issues raised in
this petition. (California v. Ramos
(1983) ____ U.S. ____ [77 L.Ed.2d 1171,
117], fn. 7; Michigan v. Long (1983)
____ U.S. ____ 77 L.Ed.2d 1201, 1214.)

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II

A VEHICLE EXCEPTION BASED ON INHERENT MOBILITY FULFILLS THE INCONTROVERTIBLE NECESSITY FOR A "BRIGHT LINE" APPROACH TO VEHICLE SEARCH CASES AND ENSURES THE PROTECTION OF INDIVIDUAL PRIVACY RIGHTS, SOCIETY'S RIGHT TO EFFECTIVE LAW ENFORCEMENT AND THE LAW ENFORCEMENT OFFICER'S RIGHT TO SAFETY

As argued in detail in petitioner's brief on the merits, for the constitutional protections granted by the Fourth and Fourteenth Amendments to remain vital a "bright line" vehicle search rule must be articulated in this case. (See, Oliver v. United States (1984) ____ U.S. ____, 80 L.Ed.2d 214, 226.)

The Fourth Amendment's requirement of reasonableness envisions a common sense approach to search and seizure law. Even if attainable, a "perfect rule" shimmering in intellectual purity, but incapable of application in the field

without the wisdom of Solomon, is neither desirable nor required by the Constitution. As a substitute for the perfect rule, a bright line approach, grounded in common sense application of settled doctrine already exists in the context of the Carroll Doctrine. (Carroll v. United States (1925) 267 U.S. 132.) The Carroll Doctrine strikes an even balance between the competing interests which come to play in every vehicle search situation, specifically: individual privacy, society's interest in effective law enforcement and the officer's right to safety. Accordingly, petitioner submits the vehicle exception created in Carroll and reaffirmed in United States v. Ross (1982) 456 U.S. 798, should be applied to all vehicles, including Mr. Carney's fully operational motor home.

A. The Carroll Doctrine,
Based as it is on Inherent
Mobility, Presents the Most
Reasonable Approach to
Vehicle Search Cases

Application of the Carroll Doctrine to vehicle searches, regardless of configuration or subjective use, presents a bright line approach to vehicle search law. Neither respondent nor his amici dispute the ability of law enforcement officers to determine what is and is not an inherently mobile vehicle. Consequently, application of this long standing doctrine to the facts of this case promotes the advantages which accompany clarity and consistency in the law.

Contrary to the cries of respondent, privacy rights play an important part in the Carroll Doctrine. The Carroll Court weighed Mr. Carroll's individual privacy rights against society's legitimate interest in preventing crime

and apprehending criminals and concluded that the exigency created by the car's ability to move overcame Mr. Carroll's privacy interests.

The configuration of the vehicle and its potential use do nothing to diminish the exigency created by inherent mobility and therefore does not serve to exclude certain vehicle configurations from the Carroll Doctrine. This conclusion is provided for in Carroll itself, which equated an automobile with a ship, motor boat and wagon, all of which could serve as temporary or permanent residences. (Carroll v. United States, supra, 267 U.S. at p. 153.) Thus, even vehicles and vessels cloaked with residential potential must yield to the exigency of mobility, just as an automobile and its private compartments must yield.

The Carroll Doctrine is not a perfect solution to the vehicle search issue. However, it is a solution which focuses on the realities of the application of the Fourth Amendment in the real world. Premised on principles announced by this Court, the mobility based vehicle exception provides law enforcement with the guidance necessary to ensure that police officers will fulfill their law enforcement duties without overstepping the bounds of their authority. Limited by probable cause and enforced through the exclusionary rule, the rights of the individual are protected.

Furthermore, the rule is reasonable and fair. Everyone has been placed on notice that their movable vessels may be stopped and searched on probable cause, without the protection afforded by a magistrate's prior evaluation of the

facts. (United States v. Ross, supra, 456 U.S. at p. 806, fn. 8; see, Oliver v. United States, supra, 80 L.Ed.2d at p. 223; Katz v. United States (1967) 389 U.S. 347, 361 (Harlan, J. concurring).)

B. An Approach Which Requires Police to Distinguish Between Vehicle Configurations and to Ascertain Subjective Use is Unworkable and Therefore Unreasonable

Respondent's position contemplates a twofold analysis. First, a police officer must determine if the vehicle he stopped is a motor home or something else. If the vehicle is a motor home, a secondary analysis is required. A motor home stopped "in transit" (i.e., while moving) may be searched without a warrant while a parked motor home is not subject to a warrantless

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search without one of the exigent circumstances which justify the search of a house.^{1/} (Respondent's Brief on the Merits, pp. 28-41.)

Step one of respondent's analysis is impossible to perform in a consistent manner. (Respondent's Brief on the Merits, p. 40.) What is a "motor home?" What is it about the outward appearance of a vehicle which suggests it is likely to be serving as at least a temporary residence? Is size the determining factor? If so, how big is a motor home? Does it have curtains? How about tinted glass? What happens

1. Respondent abandons the California Supreme Court's holding in People v. Carney which boldly stated the "automobile exception" is not based on mobility and flatly held the exception could not be applied to a motor home. (People v. Carney, supra, 34 Cal.3d at pp. 605, 610.)

when an officer looks into the backseat of a 1972 Ford LTD or the back of a Dodge pickup truck and sees a rolled out sleeping bag? Has he looked into a motor home? What is it about the LTD or pickup truck that separates them from a 35 foot Pace Arrow so that the latter is entitled to preferential treatment? Where is the line to be drawn between motor home and automobile? What are worthy vehicles and what are unworthy vehicles?

By accepting respondent's position, this Court would sentence police officers to years of hard labor deciphering the constitutional distinction between worthy and unworthy vehicles. Police officers, though trained professionals, are not equipped to distinguish between the subtleties of complex constitutional doctrine the way

appellate court judges, lawyers and law professors are equipped. Yet, they would be required to make these subtle distinctions instantaneously, in the context of infinite factual situations.

The task of applying the rule proposed by respondent would challenge a constitutional scholar. However, in the context of the closed container cases, this Court declined the opportunity to distinguish between worthy and unworthy containers because such a distinction would be improper. (Robbins v. California (1981) 453 U.S. 420, 426-427 (plurality); id., at p. 436 (Blackmun, J., dissenting); id., at p. 443 (Rehnquist, J., dissenting); id., at p. 447 (Stevens, J., dissenting).) It is no less improper for police to make a similar evaluation regarding vehicles. The task inflicted on the police is

impossible without clear guidance, and neither respondent nor the California Court provide such guidance.

For obvious reasons criminals do not wish police to be provided with workable guidelines in vehicle search cases. If the constable blunders all the evidence obtained as a result will be lost to the exclusionary rule. It is therefore beneficial to respondent, and all lawbreakers, for police to work at risk when conducting vehicle searches. Respondent notes with relish that the substantive criminal law is "clotted with 'hair-splitting' distinctions" and that police officers are asked to make instantaneous decisions about where to split the hair. (Respondent's Brief on the Merits, p. 39.) Providing another hair-splitting factor does not protect constitutional rights and can only benefit the lawbreaker.

So long as police officers work at risk in conducting warrantless searches and seizures they must be provided with bright line guidance. Though he or she acts in the best of faith, endeavoring to protect an individual's rights, if the officer makes a mistake, in this area where a mistake could so easily be made, the evidence obtained as a result of that mistake is suppressed and a murderer may go free. Some accommodation to the officers must be made, be it a bright line rule which illuminates the officer's task or some adaption of the exclusionary rule which would require consideration by the courts of the complexity of the officers task and the good faith with which he carries it out. Society is entitled to be protected from criminals.

Once a vehicle has been identified as a motor home, under respondent's approach it will fall under the vehicle exception if it is "in transit" (i.e., moving), but not if it is parked. (Respondent's Brief on the Merits, pp. 35-36.) He concedes that the considerations which make the securing of a warrant for an automobile impractical (i.e., mobility) operate with equal vigor when a motor home is moving. (Respondent's Brief on the Merits, p. 35.) He is right.

However, respondent is wrong to assume the same factors do not apply when the motor home is parked, yet fully capable of moving. The opportunity to search is fleeting because a vehicle is "readily movable." (Chambers v. Maroney (1970) 399 U.S. 42, 51.) A parked motor home requires only the insertion of a key

into the ignition to be capable of moving into the next jurisdiction. Thus, so long as the motor home retains the objective indicia of mobility it remains readily movable and the reason for the vehicle exception applies.

To differentiate between motor homes because one is moving and one is parked cannot be reconciled with respondent's privacy analysis. For example, a motor home which is parked: at a gas pump, or on the street while the owner buys a loaf of bread, or in a parking lot while the owner is at work, or in countless other situations, is not being used as a residence. These vehicles are in the stream of commerce and are not entitled to treatment different from that accorded a moving motor home or another vehicle in a like situation. These parked motor homes are just as capable

of movement and present an identical danger that they will disappear long before a warrant can be obtained. The owner of these parked motor homes cannot reasonably expect his vehicle will be treated as a residence when he is using it for transportation

The problem is not solved by differentiating between where the motor home is parked. Defining a "worthy" parking spot becomes another hair-splitting task for police with the dangers of inconsistent application inherent in that task. Again, the police are at risk in this treatment of the parking place. Furthermore, regardless of where the vehicle is parked, so long as it retains the ability to move it can disappear at a moments notice.

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Finally, differentiating between moving and parked motor homes does not protect an individual's privacy interests in their motor home. The desire for privacy which stands at the core of respondent's position can be defeated merely by placing the key into the ignition and driving the motor home. The nature of the objects contained in the vehicle remain the same and the desire to keep them secret is the same. Since the objects and the individual's desires remain constant, to afford the motor home different treatment merely because it is parked in one instance and not another is illogical, and must not be the basis for this Court's ruling.

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CONCLUSION

The necessity for bright line guidance in vehicle search cases is exemplified by the present facts. Police officers must know the limits of their authority before they encounter a vehicle in order to confidently perform their sworn duties. The People have a right to know the limits of the officer's authority so they may know what to expect and can conform their conduct accordingly. Only by providing workable guidelines can the constitutional guarantee of reasonableness have meaning.

Application of the Carroll Doctrine to all vehicles regardless of their configuration or subjective use provides such guidance and predictability. It is based on the long recognized notion that the ability to move creates a societal need which outweighs one's personal

wishes. Since the rule depends on an objective evaluation of the factors which impact mobility, it is capable of accurate and consistent application in all parts of the country. It is, in a word, reasonable.

Because Mr. Carney's motor home was clearly capable of movement, the existence of probable cause justified the search of his vehicle. Consequently, the judgment of the California Supreme Court should be reversed.

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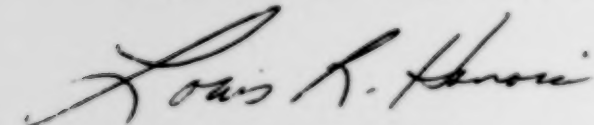
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A handwritten signature in cursive script, appearing to read "Louis R. Hanoian".

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PEOPLE OF THE STATE OF
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Petitioner,

v.

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CHARLES R. CARNEY,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 22, 1984.

Subscribed and sworn to before me
this 22 day of October 1984.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Vida M. Allen
Notary Public in and for said County and State



VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO

My commission expires Aug. 20, 1986